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Supreme Court of the United States

October Term, 1973
No. 73-1074

THE ROGERS MANUFACTURING COMPANY,
Petitioner,

vs.

THE NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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Supreme Court of the United States

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THE ROGERS MANUFACTURING COMPANY,
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vs.

THE NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on October 24, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is not yet officially reported, but is reported at 84 L.R.R.M. 2577 and is printed in the Appendix hereto at page A1. The opinion of the National Labor Relations Board (197 NLRB No. 180) is reported at 80 L.R.R.M. 1548 and 1972 CCH NLRB at ¶ 24,393 and is printed in the Appendix hereto at page A12. The opinion of the National Labor Relations Board trial examiner is not reported but is printed in the Appendix hereto at page A14. The various motions of the parties and rulings of the trial examiner are printed in the Appendix hereto at page A64 *et seq.*

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was made and entered on October 24, 1973, and is printed in the Appendix hereto at page A1. The Court of Appeals for the Sixth Circuit stayed its mandate for 30 days on November 29, 1973, and by later order, mandate was further stayed until January 14, 1974.

The jurisdiction of this Court is invoked under 29 U.S.C. § 160(e), 49 Stat. 453 (1935), *as amended*, and 28 U.S.C. § 1254, 62 Stat. 928 (1948).

THE QUESTIONS PRESENTED

1. Whether the Petitioner Was Denied Due Process of Law When the NLRB Trial Examiner Unilaterally Made 172 Changes to the Verbatim Transcript of Testimony Over the Objection of Counsel for the Petitioner.

2. Whether Existing NLRB Procedures Authorizing Wholesale Modifications to the Record Adequately Safeguard the Constitutional Rights of the Parties.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provision involved is the due process clause of the Fifth Amendment to the United States Constitution. The statutes involved are pertinent portions of the Administrative Procedure Act, 5 U.S.C. § 706, 60 Stat. 243 (1946) and the Labor Management Relations Act, 29 U.S.C. § 156, 49 Stat. 452 (1935), *as amended*, 61 Stat. 140 (1947) and 29 U.S.C. § 160, 49 Stat. 453 (1935), *as amended*.

The rule involved is Rule 10(e) of the Federal Rules of Appellate Procedure. These provisions are printed in the Appendix hereto at pages A81-84.

STATEMENT

The Petitioner, Rogers Manufacturing Company, hereinafter sometimes referred to as the "Company" or "Rogers" seeks to review the proceedings of the National Labor Relations Board (the Board) wherein the Company was found to have violated Section 8(a)(3) and (5) of the National Labor Relations Act.

Rogers was charged with various unfair labor practices, including complaints that the Company had unlawfully granted "superseniority" to replacements for economic strikers, that the Company had unlawfully withdrawn recognition of the union and that the Company had unlawfully refused to bargain with the union (A15).

A hearing on these charges was conducted by the Board's trial examiner on September 14, 15 and 16, 1971 and October 28, 1971 (A14).

Subsequent to that hearing, but before the trial examiner had ruled on the merits, the Board's General Counsel moved that twenty-five changes be made to the transcript of the proceedings (A64-66). The Company did not oppose these proposed changes and the transcript was modified, by order, on January 17, 1972 (A66-67).

At the time the General Counsel's motion to change the transcript was granted, the trial examiner, *on his own motion*, proposed that an additional 172 changes be made to the verbatim transcript of testimony reported by a Board stenographer (A66-74). The trial examiner ordered that his proposed changes would become final unless good cause

to the contrary was shown by an opponent to the changes (A67).

The Company vigorously objected to the changes proposed by the trial examiner on the grounds that: (1) none of the parties had any recollection of all the changes that were suggested; (2) many of the changes would drastically alter the substance of testimony on crucial and disputed issues; and (3) some changes added entirely new phrases and testimony (A75-77).

In particular, the Company objected to the examiner's changes concerning testimony as to "seniority" and "superseniority" which was crucial to the question of two alleged Section 8(a)(5) violations (A75-76). As counsel for Rogers pointed out in his objections, the examiner sought to change "seniority" to read "superseniority" and to add entirely *new* testimony on that subject (*Id.*).

The Company suggested that a study of the stenographer's notes be accomplished before these wholesale alterations were adopted (A76). Further, the Company argued that the *proponent* of the changes should support the particular alteration by affidavit (*Id.*). Lastly, the Company stated that the changes were so vast as to render the transcript itself meaningless and that a more serious inquiry ought to be made into the alleged mistakes (*Id.*).

The trial examiner's response to the Company's objections was that the number of changes was not unusual and that the mere number of changes was an insufficient reason to dispense with them (A77). The trial examiner added that the proposed changes were based on his personal recollection and notes of the proceeding (A77-78). The Company's suggestion that the proponent of the changes support them by affidavit was declined on the ground that from an *administrative* standpoint the better procedure

would be to allow the opponent to submit an affidavit that the transcript accurately reflects the affiant's recollection (A78). The Company again raised its objection to the massive changes proposed by the examiner and further complained that the proceeding denied it due process of law (A79). Nevertheless, all of the Company's objections were overruled and the record was changed so as to agree with the trial examiner's version of the testimony (A79-81).

On February 9, 1972, the trial examiner ruled that the Company had committed several unfair labor practices. He ruled, *inter alia*, that Rogers had unlawfully insisted upon "superseniority" for strike replacements as a condition of a contract settlement (A57). As already noted, this holding was grounded on various changes to the transcript which had been the subject of vigorous objections by Rogers. After finding that Rogers had insisted on superseniority, the trial examiner then ruled that such conduct had converted the economic strike into an unfair labor practice strike (A57).

The trial examiner's holding was adopted by the National Labor Relations Board on June 30, 1972 (A12-13).

The Company appealed to the Court of Appeals for the Sixth Circuit under the provisions of 29 U.S.C. § 160(f). Various points of error were raised on appeal, including the question of whether the trial examiner's changes to the transcript had denied the Company due process of law.

The Court of Appeals for the Sixth Circuit acknowledged that the multitude of changes to the transcript highlighted the irregularity of the proceeding but, nevertheless, the Board's order was affirmed and enforcement was granted (A10-11).

REASONS FOR GRANTING THE WRIT

1. This Court has long recognized that judicial supervision of administrative agencies can only be fulfilled when a full record is preserved as to the matters tried by the agency. *Kwock Jan Fat v. White*, 253 U.S. 454, 464 (1920). Where, as here, an administrative agency is given wide discretion that is exempt from from judicial supervision, there exists an even greater mandate that the "inexorable safeguard" of a fair and open hearing be maintained. *Ohio Bell Telephone Company v. Public Utilities Commission*, 301 U.S. 292, 304 (1937). The due process clause of the Fifth Amendment is applicable to the quasi-judicial proceedings of an administrative agency. *Morgan v. United States*, 304 U.S. 1, 14-15 (1938). To satisfy the Fifth Amendment, the administrative hearing must meet at least currently prevailing standards of impartiality. *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50, *modified*, 339 U.S. 908 (1950).

Against this background of authority, the instant case begs resolution by this Court because it calls into question certain fundamental concepts of justice and fair play which the Court has always been quick to defend in the past.

2. Exhaustive research discloses that no other court has considered allegations as raised herein. Indeed, the Court of Appeals for the Sixth Circuit seemed cognizant of this fact in its affirming opinion:

> [t]he multitude of the changes [to the transcript] highlights the irregularity [of the Trial Examiner's conduct] and we approach it with considerable caution. (A10.)

Although the court below did not discuss the nature and character of its suspicions, it implicitly recognized, as this Court has held, that the judiciary will take note of those situations where an administrative agency has not adequately explained its departure from prior norms. *Secretary of Agriculture v. United States*, 347 U.S. 645, 652-53 (1954). The lack of further authority on this question serves to highlight the irregularity noted by the court below. In short, there is no other reported case where a Labor Board trial examiner has manipulated the record in such a wholesale and unfettered manner. Accordingly, it is respectfully suggested that when 172 changes are made to a verbatim transcript of trial, over the objection of counsel, the proceeding is so irregular and questionable as to warrant the close scrutiny of the Supreme Court of the United States.

3. Although we might agree in principle that an administrative trial examiner has the power to correct the trial record, *sua sponte*, the legal authority for that power is extremely narrow.

In approving the trial examiner's actions, the court below relied on the case of *NLRB v. W. B. Jones Lumber Company*, 245 F.2d 388 (9th Cir. 1957) (A10). Inasmuch as *Jones Lumber* was the foundation for the holding below, it is appropriate that *Jones Lumber* be quoted at length:

> The trial examiner corrected the record of testimony of one witness from the figure $32,415.68, shown, to $324,015.68 from his own memory of the testimony. The common law courts have always recognized the power of the trial judge over the record. No reason is seen for circumscribing the power of the trial examiner acquiesced in by the Board. 245 F.2d at 392.

A fair reading of *Jones Lumber* suggests that the scope of that holding should be limited to the facts of the decision. The action of the trial examiner in *Jones Lumber* adding the number "zero" to a single arithmetical figure is clearly distinguishable from the instant case where the trial examiner made 172 changes to a verbatim transcript of proceedings taken by a Labor Board stenographer. The facts of *Jones Lumber* are so distinguishable that it should not be viewed as authority for the trial examiner's conduct in our case.

4. An unfair labor practice proceeding must be conducted, so far as practicable, in accordance with the rules of evidence of the Federal District Courts. 29 U.S.C. § 160 (b). Although the Federal Rules of Civil Procedure are not rules of evidence, the NLRB must abide by them also. *Frito Company v. NLRB,* 330 F.2d 458, 465 (9th Cir. 1964). Additionally, Board proceedings must comply with the Administrative Procedures Act. This Act, 5 U.S.C. § 706, prohibits agency action, findings and conclusions that are arbitrary, capricious or an abuse of discretion or otherwise contrary to law (*Id.*).

Rule 10(e) of the Federal Rules of Appellate Procedure sets forth the circumstances under which the district court may correct or modify the record of proceedings therein. Under the authority of *Frito Company, supra,* we respectfully suggest that a Labor Board proceeding must comport with the spirit, if not the letter, of Rule 10(e) and that the trial examiner in the instant case did neither.

Case law interpreting Rule 10(e) strongly suggests that notwithstanding the power conferred by the Rule, changes to the record should not be effected unilaterally. *See Illinois Central Railroad v. Riley,* 392 F.2d 787, 789 (6th Cir. 1968); *Carroll v. Frontera Compania Naviera,* 390 F.2d 311, 315-16 (3d Cir. 1968); *see generally* 9 J. MOORE,

FEDERAL PRACTICE ¶ 210.08[1], at 1649 (2d ed. 1953). For example, in *Illinois Central Railroad v. Riley, supra*, the court sought the active participation of the parties in order to reconstruct an erroneous record. In that case the parties shared an active part in the modification as indicated by their stipulation approving the correction. 392 F.2d at 789.

In the instant case no similar action was taken to safeguard the lawful interests of the Company. The trial examiner, by order, advised the company that it must show cause why the transcript ought not be modified and in failure thereof, the changes proposed by the trial examiner would be adopted (A67).

As already noted, the trial examiner required the Company to shoulder an impossible burden of proof by ordering that the opponent of changes show cause why they ought not be made. As a practical matter, the only retort available to the Company was to assert that the stenographer's verbatim record was an accurate rendition of the testimony. Accordingly, using the probable accuracy of the stenographer as a premise, the Company argued that the *proponent* of changes support the same by sworn affidavit (A76). The Company's argument was rejected by the trial examiner on the ground that "the better procedure from an *administrative* standpoint would be to permit the opponent of a change to submit an affidavit that the transcript accurately reflects the affiant's recollection" (A78 at n.3) (emphasis added). This ruling in and of itself is an error of constitutional dimension because it is well settled that administrative convenience or even necessity cannot override the constitutional requirements of due process of law. *Ohio Bell Telephone Company v. Public Utilities Commission*, 301 U.S. 292, 304 (1937).

Nevertheless, all objections by the Company were dismissed in summary fashion by the trial examiner (A78).

He did, however, allow a three-week extension of time for the purpose of Company consultation with the court reporter about the record, but this gesture was meaningless for he had already deemed the reporter's account of the testimony erroneous (*Id.*).

It is settled beyond any possible question that a district court judge may correct the record as to what occurred in the court but he cannot add or cause to be added findings which were never made nor include testimony which was never given. Similarly, it must follow that recorded testimony of an NLRB hearing, taken by an NLRB reporter, cannot be manipulated by seemingly innocuous changes so that the end result is a fabrication of evidence.

5. The decision of the court below, if unreversed, will serve to undermine the credibility and integrity of Board hearings. It is a matter of common knowledge that the NLRB is often challenged as to the impartiality of its proceedings. It should also be noted that this suspicion and criticism is not limited to proponents of the management cause. For example, in *NLRB v. Local 485 Electrical Workers Union*, 485 F.2d 17 (2d Cir. 1972), the union complained that the NLRB was "sloppy and most inept" and that the trial examiner was "hostile and one sided." 485 F.2d at 20.

We believe the holding below will unintentionally add to the present criticism and suspicion of the NLRB. As already noted, we believe that the court's interpretation of *Jones Lumber* is wrong and that it will be widely questioned. Furthermore, we believe that the facts and circumstances of the instant case are so aggravated that even the most casual reader would be offended by the conduct of the trial examiner.

The trial examiner's conduct of which we complain, is especially questionable when viewed in light of the fact that the transcript of the proceeding was taken by an NLRB court reporter, as required by Board rules.

Although we believe that a verbatim transcript should be final without regard to the affiliation of the reporter, a rule of finality is even more appropriate where the stenographer is a servant of the quasi-judicial agency itself. This approach seems only logical because in such a case the likelihood of errors or omissions on account of reporter bias is avoided. Therefore, if it is an acceptable premise that the court reporter's transcription is presumptively an accurate statement of the proceedings, it must follow that errors in such a transcript, if any, would be limited to form and not substance.

A cursory review of the changes made by the trial examiner demonstrates that his changes were not limited solely to typographical errors. In point of fact, there are numerous alterations whereby new testimony is supplied or recorded testimony is completely revised. We do not believe that errors of this breadth were made by the reporter. Furthermore, we believe that the trial examiner's justification for his changes is simply incredulous. It defies all sensibility to suggest that the court reporter would commit repetitive errors in *substantive* particulars. Further, even if substantive errors of that scope were made (and we unequivocally reject that suggestion) it is beyond all bounds of reason to believe that the trial examiner should or would be cognizant of each error or omission as his order recites. As a practical matter, to effect such wholesale revisions, the trial examiner would be required to take notes at least as extensive as those of the official reporter. For obvious reasons, that task is not within the realm of his capabilities.

In summary, it should be obvious that there is no logical explanation for the multitude of changes made to the record in the instant case. We respectfully submit that the unexplained defects in the record raise an inference of error on the part of the trial examiner. Further, we also submit that the transcript of a Board hearing should be presumed correct as to the substance of the recorded testimony and that the *proponent* of changes to the record, be it a party or trial examiner. must show cause why they ought to be made.

As the Company noted in its objections to the trial examiner, the Company was willing to be bound by the reported transcript of proceedings and so should the Board inasmuch as it was a Board proceeding and a Board court reporter (A76-77).

Prevailing concepts of justice and fair play demand that an NLRB transcript be afforded some measure of finality. Accordingly, this Court should grant certiorari so that this challenged irregularity might be considered in depth.

6. The Court of Appeals for the Sixth Circuit erred in its analysis and review of our due process claim. The lower court affirmed the NLRB order after the court was satisfied, the trial examiner's changes to the transcript notwithstanding, that the record supported the finding that the Company had insisted upon "superseniority" (A10). The gravamen of this holding is that even if the trial examiner unlawfully altered the record, his conduct was not ground for reversal because, in any event, the finding of fact would be the same.

We respectfully submit that the Court of Appeals reasoning on this point is erroneous. Where a party is denied a fair hearing, the fact that the administrative

agency might or would reach the same factual conclusion without the irregularity is entirely beside the point. *Russell-Newman Manufacturing Company v. NLRB*, 370 F.2d 980, 984 (5th Cir. 1966); *NLRB v. Burns*, 207 F.2d 434, 436 (8th Cir. 1953).

7. As already noted, we believe that the lower court's interpretation and holding is an unwarranted and unreasonable extension of the narrow rule announced in the *Jones Lumber Company* decision. The holding below will become a vehicle of even greater abuse in future labor cases unless this Court establishes reasonable restraints on the scope of discretion enjoyed by the NLRB and its trial examiners. We respectfully ask that the Court review the lawfulness of the trial examiner's conduct. We further request that the Court consider whether or not the NLRB may require that an *opponent* of changes to the record show cause why they ought not be made.

CONCLUSION

This Court has always been quick to defend the principles of fairness and impartiality implicit in the concept of due process of law. Under these well established principles, neither courts nor governmental agencies may avoid the mandate imposed by the Fifth Amendment. Although no person is entitled to a perfect trial, all parties are entitled to a fair one. Accordingly, certiorari should issue because the instant case, on its face, fails to meet the test of fundamental fairness guaranteed to all litigants.

In summary, we are not asking the Court to announce new principles of due process of law, but rather seek to enforce old ones.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS

(Decided and Filed October 24, 1973)

No. 72-2103

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE ROGERS MANUFACTURING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before: WEICK, EDWARDS and PECK, Circuit Judges.

PECK, Circuit Judge. Petitioner Rogers Manufacturing Company (hereinafter Company) pursuant to Section 10 (f) of the National Labor Relations Act, 29 U.S.C. § 151(f), filed this petition for review and vacation of an order of the National Labor Relations Board (hereinafter Board) finding violations by the Company of Sections 8(a)(1), 8(a)(3), and 8(a)(5) of the Act. The Board has filed a cross-application for enforcement of its order, which is reported at 197 NLRB 180.

The pertinent facts are as follows. In February of 1969, a local union of the United Auto Workers was certified as bargaining representative of the petitioner's production and maintenance employees at its Akron, Ohio, plant. Negotiations for a first contract began the following April but failed and in June of 1969 the Union called a strike. The period of the strike was marked with incidents of violence as the Company continued to operate with non-striking and replacement employees. After a short period, however, the Union decided to abandon the strike if it could secure reinstatement of the striking employees. In August of 1969, the Company informed the Union that the reinstated strikers would not be given credit for their previously accrued seniority. The Union thereupon rejected the Company's conditional reinstatement offer, considering the offer a demand for "superseniority"[1] for the replacements, and filed charges with the Board in May and June of 1970 respecting, inter alia, the reinstatement condition. Subsequently a settlement was reached providing that the Company agreed to bargain with the Union and would not grant superseniority to replacement employees.

Negotiations then resumed until October 15, 1970, when during a bargaining session a company spokesman announced that a petition seeking decertification of the Union had been filed with the Board by several employees. The spokesman raised the question as to whether it would be an unfair labor practice for the certified union and the

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1. The effect of the Company's offer would be that the strikers, upon their return to work, would find their seniority rights subordinated to those of the replacements so that in the event of a subsequent layoff the strikers would be dismissed before any of the replacements and the replacements would be the first to be recalled. In other words, the replacements would have "superseniority."

company to continue to negotiate and arrive at a contract under the circumstances. After a colloquy in which the chief company spokesman repeated his concern that the continued negotiations would violate the Act, the chief union spokesman asserted. "You are refusing to meet with us." The company spokesman replied, "No, we are not refusing to meet with you, there is danger of violating the law," and the union spokesman replied, "If that is the situation, there is no point in having any further meetings." A month later when the petition was ultimately dismissed by the Board, negotiations resumed. In March of 1971, the Union "unconditionally returned to work" and asked for reinstatement of the strikers. The Company took no action toward the reinstatement until April when the employees were notified that they were to report for interviews at which time they were allegedly advised that they would be treated, for seniority purposes, as new employees pending a Board ruling on the matter. All twenty-six strikers seeking reinstatement were offered jobs but for sixteen the jobs were a step down to more hazardous work. Only one of the sixteen accepted. In June of 1971, the Union terminated the strike and renewed its offer to return to work. Although the Company immediately offered reinstatement, the Company's relatively short deadline for a response was not met and the offer was not renewed.

The Board, in affirming the findings of the Trial Examiner, found that the Company improperly suspended negotiations while the decertification petition was pending; that it delayed offers of reinstatement until April of 1971; that it improperly cancelled the strikers' seniority; that post-settlement unfair labor practices warranted setting aside the August, 1970 settlement agreement; that the Company improperly insisted upon superseniority; that

in December of 1969 the insistence upon superseniority became a cause of or prolonged the strike; and that the Company's failure to offer reinstatement in March of 1971 to the strikers of their former or substantially equivalent jobs was a violation of the Act. The Board's order, inter alia, requires reinstatement and reimbursement of lost pay for the twenty-six strikers.

The Board found that the suspension of negotiations in 1970 was attributable to the Company and that this conduct, together with the Company's delay in reinstating and granting to the strikers their pre-strike rights, justified setting aside the settlement agreement. The suspension of negotiations was viewed as a direct breach of the settlement agreement and the other actions were seen as substantial independent and unfair labor practices. We conclude that there is substantial evidence on the record as a whole to support the Board's findings.

We turn to the issue arising out of the Company's suspension of negotiations. This Court has recently held that under some circumstances an employer may be warranted in refusing to bargain with a union about whose majority he has a good faith doubt, see *N.L.R.B.* v. *Dayton Motels, Inc.*, 474 F.2d 328, 331-32 (6th Cir. 1973), but the mere filing of a decertification petition is of itself insufficient justification. *Cf. Allied Industrial Workers, AFL-CIO Local Union No. 289* v. *N.L.R.B.*, 476 F.2d 868, 881 (D.C. Cir. 1973). Rather, evidence indicating that a good faith doubt was reasonably grounded must be advanced. Contrary to the Company's argument, however, the fact that certain employees did not support the strike or that replacement employees were hired is insufficient evidence that the employees have repudiated the union as its bargaining representative. See, *Allied Industrial Work-*

ers, AFL-CIO Local Union No. 289 v. *N.L.R.B., supra.* As a matter of fact, the Company's engagement in unfair labor practices during the strike, such as are hereinafter discussed, the demand for superseniority, casts a shadow on allegations of good faith. We agree with the Board that the Company has not met its burden in this respect.

In addition, it is well settled that "an employer must bargain with a union for a reasonable period without regard to its majority status where the bargaining relationship arose as a result of a settlement agreement." *N.L.R.B.* v. *Universal Gear & Service Corp.*, 394 F.2d 396, 398 (6th Cir. 1968). Therefore, even assuming that the Company had a good faith doubt as to the Union's majority at the time the decertification petition was filed, the Company plainly obligated itself in the August settlement agreement to bargain with the Union but broke off negotiations two months later. Under these circumstances, we conclude that the Board properly found that the Company's suspension of negotiations in October of 1970 was violative of Section 8(a)(5) and (1) of the Act.

As regards the Board's findings that the Company violated Section 8(a)(3) of the Act by delaying its offers of reinstatement to the strikers until April of 1971 and by cancelling the strikers' seniority, the Company maintains that the strikers were not entitled to either reinstatement offers or back pay while they continued their strike.

The record indicates that the Union made an unconditional offer to abandon the strike and return to work, effective March 1, 1971. However, it was more than a month later when the Company responded to the applications for reinstatement. The law is settled that economic strikers are entitled to their former positions upon their unconditional application for reinstatement, absent some legiti-

mate and substantial business justification. And the burden of proving such justification is on the employer who denies or delays reinstatement. *N.L.R.B.* v. *Hartmann Luggage Co.*, 453 F.2d 178, 181 (6th Cir. 1971), citing *N.L.R.B.* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). The record reveals that only assembly room work was not then available and testimony from the Company works manager acknowledges "some vacancies in the press and press operators." We conclude that the Company has failed to detail sufficient and legitimate business justifications for the delay and that there is sufficient evidence to support the finding of the Board.

The returning strikers were advised by the Company that they were to be treated as new employees until such time as the Board ruled otherwise, but the law is clear that returning strikers are entitled to receive all their former rights and privileges, including seniority. *N.L.R.B.* v. *Robinson*, 251 F.2d 639, 641-42 (6th Cir. 1958). The record contains considerable support for a finding of violation of this standard, as the Board found.

The Company also argues that the complaint herein did not allege discrimination against the strikers as economic strikers but only as unfair labor practice strikers. We are satisfied that any variance was not prejudicial. Evidence on this point was introduced without objection and the Company had adequate notice of the matters in issue. As quoted with approval in *Rea Trucking Co.* v. *N.L.R.B.*, 439 F.2d 1065, 1066 (9th Cir. 1971), " 'The Board . . . has an obligation to decide material issues which have been fairly tried by the parties even though they have not been specifically pleaded.' [citations omitted]." Compare, *N.L.R.B.* v. *Johnson*, 322 F.2d 216, 219-20 (6th Cir. 1963), *cert. denied*, 376 U.S. 951.

It is of course recognized that the Board may not consider matters properly disposed by a settlement agreement "unless there is a breach of the agreement or a subsequent independent violation of the Act by the parties to the agreement." *Lincoln Bearing Co.* v. *N.L.R.B.*, 311 F.2d 48, 50 (6th Cir. 1962). See, also, *N.L.R.B.* v. *Superior Tool & Die Co.*, 309 F.2d 692, 695 (6th Cir. 1962). We conclude that certain illegal pre-settlement conduct by the Company indicates that unfair labor practices were committed after execution of the settlement agreement and that such acts justified setting aside the agreement. We further conclude that it was proper for the Board to consider, as it did, whether the Company's presettlement unfair labor practices converted the existing economic strike into an unfair labor practice strike even though the original charges made no specific allegation to that effect. *N.L.R.B.* v. *Lasko Metal Products, Inc.*, 363 F.2d 529 (6th Cir. 1966). In particular, in this case it is clear that the Company was timely informed by a consolidated complaint that such an issue would be raised.

As to the actual activities, the record establishes that after the strike had been conducted for a short period, the Union sought to abandon it and concentrated on securing the reinstatement of the strikers. However, beginning in August of 1969, the Company demanded superseniority for the replacements as the price for reinstating the strikers. As noted by the Trial Examiner, Section 10(b) of the Act, 29 U.S.C. § 160 (b), prohibits the Board from basing any finding of a violation of the Act on an event occurring more than six months before service upon the company of the charge filed with the Board. Since service was not effected until May 15, 1970, the applicable cut-off date was November 15, 1969. The first meeting subsequent to this date at which superseniority was demanded was December 3, 1969.

Therefore, as found by the Trial Examiner and affirmed by the Board, December 3 is the earliest date on which the Company may be found to have violated the Act by its insistence on superseniority and on which the strike may be found to have been prolonged because of such insistence.

Turning to the issue of superseniority, it is settled that insisting upon superseniority for strike replacements constitutes a refusal to bargain in violation of Section 8(a)(5) and (1) of the Act. *N.L.R.B.* v. *Erie Resistor Corp.*, 373 U.S. 221, 230-37 (1963); *Philip Carey Manufacturing Co.* v. *N.L.R.B.*, 331 F.2d 720, 726-29 (6th Cir. 1964), *cert. denied*, 379 U.S. 888. As the Company concedes in its brief, "[T]here is substantial evidence to support a finding that [the Company] proposed superseniority for strike replacements some time in 1969." Likewise, we conclude that there is substantial evidence to demonstrate that from August of 1969 through May of 1970, after which the settlement agreement was reached, the Company adhered to this demand and that such insistence interfered with the reaching of an accord on reinstatement of the strikers. Indeed, such evidence substantially supports the Trial Examiner's conclusion, affirmed by the Board, that the Company's pre-settlement insistence on superseniority for non-striking and replacement employees from December 3, 1969, violated Section 8(a)(5) and (1) of the Act.

It is clear also that the Board had a substantial basis for inferring that the Company's unlawful insistence on superseniority prolonged the strike and thus on December 3, 1969, converted the existing economic strike into an unfair labor practice strike. The fact that unresolved contractual issues may have remained is not crucial since a single area of disagreement (in this case the demand for superseniority) need not be the sole cause for failure to

agree. *Philip Carey Manufacturing Co.* v. *N.L.R.B., supra* at 728; *United Steelworkers of America, AFL-CIO, Local 5571* v. *N.L.R.B.*, 401 F.2d 434, 437 (D.C. Cir. 1968), *cert. denied*, 395 U.S. 946. We find substantial evidence on the record that the Company's position on superseniority was consistent until execution of the settlement agreement and contributed to the prolongation of the strike.

In addition, following the conversion of the strike to an unfair labor practice strike, the strikers were entitled to unconditional reinstatement to any of their former jobs for which no replacements had been hired prior to the date of the conversion. *N.L.R.B.* v. *International Van Lines*, 409 U.S. 48, 50-51 (1972), and the reinstatement should have been to the same job (or its substantial equivalent) held by the striker prior to the strike. *G.P.D., Inc.* v. *N.L.R.B.*, 406 F.2d 26, 32 (6th Cir. 1969). The Trial Examiner found, and the record supports the findings, that sixteen strikers were offered less desirable and more hazardous work than they previously performed prior to the strike. The record also reveals that the Company had hired thirteen replacements in the area in which sixteen workers formerly worked, i.e., the assembly area, subsequent to the date of the strike conversion, December 3, 1969. Consequently, those strikers who were regularly employed in the assembly area before the strike should have been offered reinstatement to the thirteen positions. It is noted that the Trial Examiner unexplainably ordered that fourteen strikers were entitled to reinstatement in the assembly area. We leave to compliance proceedings the question of which striker may not be entitled to reinstatement.

One other matter requires our attention. The Company charges that the Trial Examiner unlawfully made over 170 changes to the transcript, some of which have

allegedly altered the testimony to a substantial degree. The multitude of the changes highlights the irregularity and we approach it with considerable caution. We first acknowledge a trial judge's sua sponte power to correct the record in accordance with his memory. *N.L.R.B.* v. *W. B. Jones Lumber Co.*, 245 F.2d 388, 392 (9th Cir. 1957). See also, 7 Moore's Federal Practice § 75.08[1] (1972). We also note the Trial Examiner's explanation that the changes were "based not only on his recollection of his own remarks, as well as those of the witnesses and counsel, but also on extensive notes taken by him at the hearing, and the context in which the questioned items appear." Principally, the Company objects to the addition of the words "without superseniority" to a witness's testimony, thereby materially altering what had been recorded as the testimony. We are satisfied from a review of the record that the modification of the testimony is corroborated by testimony by the same witness to the same effect in two other places in the transcript, neither of which are challenged by the Company. Finally, in this regard, we are convinced that the record supports the Board's finding that the Company insisted upon superseniority.

All other contentions of the Company we conclude to be without merit. The Board's order is affirmed and enforcement is granted.

JUDGMENT OF THE COURT OF APPEALS

(Filed October 24, 1973)

No. 72-2103

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE ROGERS MANUFACTURING COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

JUDGMENT

Before: WEICK, EDWARDS and PECK, Circuit Judges.

On Petition for Review and cross-petition to enforce an order of the National Labor Relations Board,

THIS CAUSE came on to be heard on the transcript of the record from the National Labor Relations Board and was argued by Counsel.

ON CONSIDERATION WHEREOF, It is now ordered, adjudged and decreed by this Court that the order of the NLRB be and it is hereby enforced.

It is further ordered that Respondent recover from Petitioner the costs on appeal as itemized below.

Entered by order of the Court.

JAMES A. HIGGINS,
Clerk

DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

(Issued June 30, 1972)

Cases 8-CA-5859
8-CA-6310

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE ROGERS MANUFACTURING COMPANY,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), LOCAL 1610

DECISION AND ORDER

On February 9, 1972, Trial Examiner Sidney Sherman issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the Trial Examiner's Decision in light of the exceptions and brief and has decided to affirm the Trial Examiner's rulings,[1] find-

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1. Respondent has excepted to the Trial Examiner's order of February 7, 1972, wherein he ordered certain corrections of the transcript which had been set forth in his order of January 17, 1972. Respondent was given full opportunity to object spe-

(Continued on following page)

ings,[2] and conclusions and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Trial Examiner and hereby orders that the Respondent, The Rogers Manufacturing Company, Akron, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's recommended Order.

Dated, Washington, D.C.. June 30, 1972.

EDWARD B. MILLER, Chairman
JOHN H. FANNING, Member
HOWARD JENKINS, JR., Member

(Seal) National Labor Relations Board

Footnote continued—

cifically to any and all changes. The Trial Examiner considered Respondent's motion and response relative to this matter and made the changes. Accordingly, we deny Respondent's exception No. 5. Moreover, our review shows the changes were appropriate to the context of the transcript and as to others they were not crucial to the decision herein.

2. Chairman Miller concurs in the result herein, but, with respect to the finding that Respondent improperly refused to bargain on October 15, relies solely on the fact that the Respondent had not bargained for a reasonable time following the August settlement agreement. Under these circumstances, Chairman Miller agrees that Respondent could not rely on the filing of a decertification petition as a justifiable reason for interrupting the course of bargaining.

DECISION OF TRIAL EXAMINER

(Issued February 9, 1972)

Cases 8-CA-5859
8-CA-6310

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE ROGERS MANUFACTURING COMPANY,

and

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW), LOCAL 1610

TRIAL EXAMINER'S DECISION

SIDNEY SHERMAN, Trial Examiner: The initial charge herein in Case No. 8-CA-5859 was served upon Respondent on May 15, 1970. The charge in Case No. 8-CA-6310 was served on March 17, 1971. The consolidated complaint issued on June 29, 1971, and the case was heard on September 14, 15 and 16, and October 28, 1971. After the hearing briefs were filed by Respondent and the General Counsel. The issues litigated related to alleged violations of Section 8(a)(1), (3) and (5).

Upon the entire record,[1] including observations of the witnesses' demeanor, the following findings and recommendations are made:

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1. For corrections of the transcript, see the order of January 17, 1972, the General Counsel's motion referred to therein, and page 389 of the transcript. See also, the orders of January 26, and February 7, 1972.

I. Respondent's operations

The Rogers Manufacturing Company, hereinafter called Respondent, is an Ohio corporation, with a plant in Akron, Ohio, where it is engaged in manufacturing automobile parts. It annually receives at the plant directly from out of state points goods valued at more than $50,000. Respondent is engaged in commerce under the Act.

II. The Union

International Union, United Automobile Aerospace and Agricultural Implement Workers of America, Local 1610, UAW, is a labor organization under the Act.[2]

III. The Merits

The pleadings raise the following issues:

1. Whether Respondent has violated Section 8(a)(5) and (1) of the Act by:

(a) Insisting since November 14, 1969, upon superseniority for strike replacements as a condition of reaching agreement.

(b) Refusing for a period of 6 weeks after June 9, 1970, to bargain with the Union.

(c) Insisting since August 6, 1970, on a contract clause "which would have the effect of granting superseniority for strike replacements."

(d) Modifying its contract proposals after their acceptance by the Union.

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2. Respondent contended that the Union became defunct after August 1970. However, there was no contradiction of the testimony of Union representative Costello that it has held periodic meetings since that date and still has a substantial membership.

(e) Withdrawing recognition of the Union on October 7, 1970, and refusing to meet with the Union until November 17, 1970.

2. Whether the strike, which began on June 9, 1969, was converted into an unfair labor practice strike by any of the foregoing alleged violations of Section 8(a)(5)?

3. Whether Respondent violated Section 8(a)(3) and (1) of the Act by failing or refusing to reinstate 26 named strikers, upon application, to their former or substantially equivalent jobs?

A. *Sequence of Events*

On February 28, 1969, the Union was certified by the Board as the representative of Respondent's employees in a plant-wide unit. In April, negotiations for a first contract began and were still in progress at the time of the instant hearing, more than 2½ years later. On June 9, 1969, the Union called a strike, and the majority of the unit employees responded. Respondent continued to operate during the strike with non-strikers and replacements for strikers. During the ensuing negotiations, a major topic of discussion was whether, in the event the strikers returned to work, their seniority rights would be subordinate to those of the replacements, so that in case of a subsequent layoff the strikers would be dismissed before any of the replacements, and the latter would be the first to be recalled or, in other words, whether the replacements should be granted superseniority.

On May 14, 1970, the Union filed the initial charge in the proceeding, alleging a violation of Section 8(a)(5) on the basis of an alleged change in Respondent's position. On June 19, 1970, the Union filed an amended charge,

8-CA-5859, alleging that Respondent had violated Section 8(a)(5) and (1) of the Act by, in addition, insisting on superseniority for strike replacements. On August 5, 1970, a settlement agreement was executed providing for the posting of a notice to Respondent's employees, containing a pledge, *inter alia*, (1) that Respondent would bargain upon request with the Union as the representative of the plant-wide unit. (2) that it would not create obstacles to agreement by changing proposals with regard to which tentative accord had been reached, and (3) that it would not grant superseniority to employees hired as replacements for strikers.

Bargaining resumed thereafter, was broken off early in October after a decertification petition was filed, but started up again about a month later after that petition was dismissed. There have been numerous meetings since, but at the time of the instant hearing there was still a number of unresolved issues. The strike continued without any break from June 9, 1969, to March 1, 1971, when all those still on strike applied unconditionally for reinstatement. No action was taken on these applications until early in April, when Respondent began to offer the strikers jobs, which in many cases were not identical with their pre-strike jobs. Meanwhile, on March 12, 1971, the Union filed the charge in Case No. 8-CA-6310, alleging a discriminatory refusal on March 1 to reinstate the strikers, and an unlawful withdrawal of recognition on or about October 15, 1970. On June 24, the Regional Director notified Respondent that, in view of certain alleged post-settlement violations of the Act, he was vacating the settlement agreement and reinstating the charge in Case No. 8-CA-5859 insofar as it alleged a violation of Section 8(a)(5). Thereafter, the instant consolidated complaint issued.

B. *Discussion*

1. The 8(a)(5) issue

The appropriate unit

The complaint alleges that the unit for which the Union was certified by the Board is the following:

> All production and maintenance employees at Respondent's Akron, Ohio, plant, including all engraving and stamping division employees and progressive pulley division employees, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

While disputing the appropriateness of such unit, Respondent's answer admits that it is the one for which the Union was certified on February 28, 1969. As insufficient reason appears in the record for departing from the certification in that respect, it is found that the aforedescribed unit is appropriate for collective bargaining.

The Union's Majority Status

While denying that the Union has been since February 28, 1969, the statutory representative of the employees in the above unit, Respondent's answer admits, as already noted, that the Union was certified by the Board as such representative on that date. Moreover, as will appear below, in November 1970, in affirming the dismissal of a decertification petition, the Board ruled that at that time Respondent was still required to recognize and bargain with the Union. Respondent made no contention at the hearing, and offered no evidence, that there has been any change in the Union's status since that date. It is therefore found that the Union has been at all times here mate-

rial the statutory representative of employees in the aforedescribed appropriate unit.

The only violations alleged to have occurred since the settlement agreement were the following:

(a) Insistence on a clause that would "have the effect of" granting superseniority to strike replacements.

(b) Modifying contract proposals after their acceptance by the Union.

(c) A temporary withdrawal of recognition for about 6 weeks.

(d) The refusal to reinstate strikers, upon application, to their former or substantially equivalent jobs.

Pre-settlement Events

Under the Board's current policy, it is appropriate to consider Respondent's pre-settlement conduct at this point, but only as background for the evaluation of its post-settlement conduct.[3] A discussion of such background events follows.

Bargaining began in April 1969, at which time Respondent submitted its initial contract proposals. On June 9, 1969, no agreement having been reached, the employees struck. It is apparent from a consensus of all the testimony on the point, including that of Rabe, Respondent's counsel, that after the strike began the pre-settlement bargaining was conducted on two levels, discussion of what to put into a contract being interspersed with discussion of how to end the strike; that the latter received more attention than any other issue; that the Union decided to

3. Such pre-settlement conduct may be considered for all purposes only after it is determined that there have been post-settlement violations of the Act.

abandon the strike soon after it started and pressed Respondent to take back all the strikers; that on August 19, 1969, Respondent indicated that it intended to grant "superseniority" to non-strikers and strike replacements, which, as explained above, meant that after the strikers returned their retention rights, in case of any future layoff, would be subordinate to those of the other employees; that on November 14, 1969, having need for additional workers, Respondent make a firm offer to take back all the strikers, except for a few who had been guilty of strike misconduct, but agreement was prevented by inability of the parties to resolve the foregoing issue of "superseniority"; that on December 3, 1969, discussion of the return of the strikers again foundered on the superseniority issue; that on December 29, 1969, there was further discussion of reinstating the strikers, but Respondent took the position that there were no longer any openings for them because about 20 non-strikers had been laid off, and they would have to be recalled before any of the strikers; that, although on February 13, 1970, Respondent raised an additional obstacle to reinstatement of the strikers—the requirement that they take a polygraph test—this demand was promptly abandoned, so that at the meeting on March 23, 1970, the superseniority issue was again the only obstacle to accord on a procedure for recalling the strikers; and that at the last, pre-settlement, bargaining session on May 27, 1970, Respondent adhered to its superseniority position, citing a commitment it had made to the strike replacements that, in case of a layoff, they would be retained in preference to the strikers.

In the meantime, on May 14, 1970, the Union had filed the initial charge herein, and on June 19, 1970, it filed an amended charge which added the allegation that Respondent had violated Section 8(a)(5) of the Act by its

insistence on superseniority for strike replacements. On August 5, 1970, the parties executed a settlement agreement, wherein Respondent pledged, *inter alia*, that it would not "grant" superseniority to employees hired as replacements for strikers.

Post-Settlement Events

After the execution of the foregoing agreement the parties resumed bargaining. According to Union negotiator Costello, at the first of these bargaining sessions Respondent reverted to its insistence on superseniority, and it was not until the fifth session, on September 30, 1970, that it finally abandoned that demand. At that meeting it proposed for the first time the following clauses on layoff and recall:

> In a layoff the Company will retain the employees whom the Company considers the most qualified for the job to be done. In the event the Company considers two (2) employees to be equally qualified for the job in question, then whichever of the two employees had the greater departmental seniority, would be retained.
>
> In recalling employees from layoff, the Company will recall the employee it considers most qualified for the available job. If the Company considers two (2) employees to be equally qualified for the job, then it will recall the more senior of such two employees.

The General Counsel attacks the foregoing proposed language on the following grounds:

(a) It is merely superseniority in disguise, for, while it does not on its face purport to give preference to nonstrikers or strike replacements, there is nothing therein to

prevent Respondent from professing to consider one of them better qualified than a returning striker to perform a particular job.

(b) The foregoing clauses constituted a modification of a prior contract proposal.

With respect to (a), the General Counsel's position assumes that Respondent's proposal was advanced in bad faith, in an effort to circumvent the strictures of the Act, as well as of the settlement agreement, against forthright insistence on superseniority.[4] Respondent counters that under the grievance procedure proposed by it any alleged misuse by it of the proposed layoff and recall procedure would be subject to review by an arbitrator. However, the General Counsel retorts that any effective review by an arbitrator of a determination by Respondent that one employee is more competent than another is precluded by (1) the fact that the proposed language did not provide for selection of the ablest employee but only of the one who *was so considered* by Respondent, so that the only issue properly before the arbitrator would be whether Respondent in fact considered one employee abler than another, and (2) the "management rights" clause in the contract, as proposed by Respondent, which required the Union to recognize the Respondent's right, *inter alia*, "to determine the policies affecting the selection of employees and ability of employees," thereby rendering it doubtful whether even the foregoing necessarily limited review of Respondent's state of mind would be permissible. However, it is undisputed that on September 1, 1971, Respondent proposed that there be written into the contract an express provision for arbitration of any grievance with respect to the application of the proposed provisions in

4. *Erie Resistor Corp.*, 373 U.S. 221.

layoff and recall, and there was no contradiction of the testimony of Kaminski, Respondent's counsel, that his fellow negotiator, Rabe, also offered on that date to include a provision placing the burden on Respondent of proving to the arbitrator that its decision was based on objective standards and that Respondent had properly applied those standards in evaluating an employee's relative ability. Such testimony is credited, and it is clear that the foregoing proposal, if adopted, would have been an effective curb on any attempt to use the proposed layoff and recall procedure as a vehicle for discrimination against returning strikers.

The General Counsel, nevertheless, urges that it be found that on September 30, 1970, and at all later meetings prior to September 1, 1971, Respondent, in effect, insisted that it have unreviewable discretion in evaluating the relative ability of its employees under the proposed layoff and recall procedures and that such insistence was unlawful because of the danger that in the exercise of such discretion Respondent would discriminate against returning strikers, with the result that non-strikers would be accorded superseniority.

One might well agree with the General Counsel's premise that Respondent's position until September 1, 1971, constituted, in effect, insistence upon an unreviewable discretion. However, there are two objections to the conclusion that such insistence was unlawful. First, the fact that Respondent eventually retreated from that position, proposing a procedure that would have subjected its actions to effective review, tends to support Respondent's contention that it at no time intended the clause to operate as a disguised form of superseniority for non-strikers. Moreover, the mere fact that contract proposals, which, as here,

are innocent on their face, are susceptible of abuse would not seem to be sufficient reason to condemn them. There are many situations where powers granted to management are subject to abuse. Thus, in exercising his universally recognized right to determine the size of his labor force and the scope of his operations, an employer might decide to eliminate certain operations in order to rid himself of the union adherents employed therein. However, that possibility alone would not render unlawful an employer's insistence on a clause reserving to him the right to determine the size of his operations. The union's only recourse would be to charge him with an unfair labor practice *after* he exercised that prerogative for a discriminatory purpose. So, here, the Union would have the same recourse, if, in applying a layoff and recall procedure such as was here proposed by it, Respondent displayed a tendency to prefer non-strikers to returning strikers; but, as of now, the General Counsel is anticipating discriminatory conduct which has not yet occurred.

It is true that there is background here of outright insistence on superseniority for non-strikers, and that such background renders it not unlikely that, in applying its proposed layoff and recall procedure, Respondent would be tempted at least to resolve against returning strikers any doubts as to their superseniority over non-strikers.[5] However, it seems that the better course would be not to condemn for such a reason contract proposals innocent on their face but to give Respondent an opportunity to demonstrate its good faith through its deeds, particularly since it is now willing to submit such deeds to effective scrutiny by an arbitrator.

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5. See, also, the discussion below of Respondent's cancellation of the strikers' seniority, particularly at fn. 23, *infra*.

Under all the circumstances, the evidence is not deemed to preponderate in favor of a finding that the new proposals of September 30, 1970, with respect to layoff and recall procedure were tantamount to a demand for superseniority.[6]

In support of his further contention that such new proposals represented a change of position by Respondent, the General Counsel cites his Exhibit 11, which shows that Respondent's initial contract proposal in April 1969, was that employees be laid off and recalled on the basis of departmental seniority, subject only to the proviso that the employee to be retained or recalled for a particular job demonstrate his competence to the satisfaction of his foreman. While the new proposals represented a hardening of Respondent's position in the area of seniority, the fact remains that, by abandoning its superseniority demand,

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6. The General Counsel's related contention that Respondent orally insisted on superseniority for non-strikers throughout all the bargaining sessions between August 5 and September 30, 1970, is supported by the testimony of Union representative Costello and corroborated by the Union's counsel, Sheppard, with respect to the meeting of September 16, which was the only one of those sessions that he attended. However, Costello's notes taken at those meetings make specific reference to that issue being mentioned only at two of these meetings—on September 9 and 16—and the reference thereto on September 9, appears to have been merely by way of recapitulation of past bargaining. Rabe denied that he raised the issue of superseniority at any of these meetings, insisting that he, in fact, on those occasions expressly disclaimed any interest in superseniority. In view of the foregoing circumstances, and as Respondent had just executed a settlement agreement in which it renounced superseniority for non-strikers and striker replacements, as well as the fact that it proposed on September 30, 1970, a new layoff and recall procedure, which, at least on its face, was non-discriminatory, I am inclined to credit Rabe's foregoing denials, except as to the meeting of September 16. As Costello's testimony is corroborated with respect to that meeting by his own notes, as well as by Sheppard, it is found that Respondent did revert to its superseniority proposal at that meeting. However, such an isolated incident cannot be deemed the sort of adamant insistence condemned in *Erie Resistor, supra,* and *N.L.R.B. v. Borg-Warner,* 356 U.S. 342.

Respondent had made a concession, albeit reluctantly, in the same area. The mere fact that it made an offsetting new demand does not warrant a finding of bad faith, much less a finding of a *per se* violation.[7]

There remains to be considered, on the issue of the strikers' seniority, a clause in Respondent's contract proposal of September 30, 1970, which reads as follows:

> In the event striking employees return to work they shall not receive any seniority credit for the time they were on strike.

Sheppard testified that since September 30, 1970, Respondent has adhered to that demand and still does; and, Respondent's counsel at the hearing conceded that such was, in fact, the case. It is so found. Moreover, on the basis of Costello's uncontradicted testimony it is found that the substance of this clause was proposed orally by Respondent as early as November 14, 1969.[8] In his brief, the General Counsel for the first time, characterizes the foregoing clause as a form of superseniority, citing *General Electric Company*, 80 NLRB 510, where it was held to be a violation of Section 8(a)(3) for a respondent to toll seniority for strikers during a strike without tolling the seniority of non-strikers, because, by thus changing the relative pre-strike seniority of strikers and non-strikers, the former "became more vulnerable to lay-off or discharge in the event of a subsequent necessary reduction in force."

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7. See *Continental Bus System, Inc.*, 128 NLRB 384, 394, aff'd 294 F. 2d 264 (C.A. D.C.); *R. J. Oil & Refining Co., Inc.*, 108 NLRB 641, 643; *Solar Aircraft Co.*, 109 NLRB 130, 133; *The Philip Carey Manufacturing Company*, 140 NLRB 1103, 1126-1127, enf'd in part 331 F. 2d 720 (C.A. 6), cert. denied 379 U.S. 888.

8. In view of this finding, the General Counsel's contention that the written proposal of September 30, 1970, represented a change in position is rejected.

In view of the evidence, discussed below, that even before the strike Respondent gave significant effect to seniority for purposes, *inter alia*, of layoff and recall, it is apparent that the proposal to toll seniority for the strikers for the duration of the strike would have adversely affected their seniority standing in relation to the non-strikers and the strike replacements and would have rendered them more vulnerable to layoff under Respondent's pre-existing personnel practices, as well as under its aforedescribed proposal to follow seniority in layoff and recall where ability was equal. Thus, the instant proposal had, albeit to a lesser extent, the same vice as the classical, super-seniority proposal, in that it made the strikers' tenure less secure by virtue of the fact that they had struck.

However, although there is no substantial dispute as to the relevant facts, no violation will be found here for procedural reasons. The only post-settlement violation alleged in the complaint with respect to the subject matter of the bargaining related to Respondent's insistence on a clause "which would have the effect of granting super-seniority for strike replacements."[9] In his reply to Respondent's motion for a bill of particulars, as well as at the hearing, the General Counsel asserted that the clause in question was the one discussed above pertaining to the new layoff and recall procedure; and, Respondent opposes any finding of a violation based on its alleged insistence on an entirely different clause.[10] This contention is found to have merit, since the General Counsel's position in his reply to the motion for particulars, as reiterated at the hearing, is deemed tantamount to a disclaimer of reliance on any clause other than the one specified.

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9. Paragraph 10(E) of the complaint.

10. See Respondent's letter of January 21, 1972, to the Trial Examiner.

We come now to the contention that Respondent violated the Act by withdrawing recognition from the Union on October 7, 1970, and refusing until November 17, 1970, to meet with it again. As already noted, the settlement agreement was executed on August 5, 1970, and there were several bargaining sessions in August and September. On October 5, 1970, a petition for decertification of the Union was filed by an employee. At the next bargaining session, on October 15, 1970, Respondent's counsel, Rabe admittedly raised the question of the legal effect of such petition on Respondent's duty to continue bargaining. According to Union representative Costello, Respondent took the flat position that it was "against the law" to continue negotiations during the pendency of the decertification petition. Rabe's version was that he merely expressed the view that, if negotiations continued in the face of the petition, both parties might be charged with an unfair labor practice, analogizing the situation to one where an employer recognizes one union during the pendency of an organizing campaign by another. Rabe added that, when Union negotiator Davis indicated disagreement with this position, Rabe proposed that he call the Board's regional office and obtain its opinion; that Davis' only response was that Rabe was refusing to bargain; that, disputing this charge, Rabe reiterated that there was a danger of violating the law; and that, after observing that in that case there was no point to continuing the meeting, Davis broke off the discussion. On October 29, 1970, the Regional Director dismissed the decertification petition, which action was affirmed by the Board on November 17, 1970, on the ground that, in view of the recent execution of the settlement agreement, no question concerning representation might as yet properly be raised. Bargaining was resumed on November 18.

While I am inclined to credit Rabe's foregoing testimony, since it was not contradicted by Davis and Costello's testimony on the point was rather meager, it is still apparent, even on the basis of Rabe's version, that he convinced Davis that by any further negotiations at that time the parties would run a serious risk of violating the Act. While it may be urged that Rabe's profession of willingness to continue bargaining, if Davis obtained a favorable ruling from the Board's regional office, was some evidence of good faith, the question arises why Rabe did not himself call that office and verify the advice he was giving Davis. The fact is that, even though he was admittedly told by the Regional office on October 22 or 23, 1970, that the decertification petition would be dismissed,[11] and it was in fact dismissed by the Regional Director on October 29, Rabe waited until the ruling of the Board on November 17, before he attempted to resume negotiations. Moreover, although he was patently a knowledgeable practitioner in the field of labor law and had ready access to reference materials, Rabe admittedly made no effort to ascertain whether his advice to Davis was in conformity with Board precedent. Had he examined such precedents he would have found that there was much greater danger of violating the Act by suspending negotiations than by continuing them. For, I am aware of no ruling, and none has been cited, that continued bargaining here would have constituted unlawful assistance to the Union, merely because of the pendency of the decertification petition. Indeed, the Board has specifically rejected the contention that it should extend to the filing of a decertification petition its rule that the filing of a representation petition by a rival union suspends the duty to bargain with an incumbent union.[12] And, the Board has uniformly held that,

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11. See General Counsel's Exhibit 17.

12. *The Perry Rubber Company*, 133 NLRB 225, 228.

where, as here, an employer has entered into a settlement agreement providing for bargaining with a union, he must continue to bargain for a "reasonable time" and may not break off negotiations, merely because of the filing of a decertification petition, even though he "believed in good faith that a question concerning representation might exist."[13] As the foregoing citations show, this view has received uniform judicial approval.

Thus, Respondent might have justified breaking off negotiations on October 15, only by showing that it had bargained for a reasonable period after August 5. However, there is no need to consider at this time whether under the circumstances the two months between the execution of the settlement agreement and the filing of the decertification petition constituted a reasonable period, since the Board has already resolved that question against Respondent, in affirming the dismissal of that petition under authority of the cases just cited, and Respondent has offered no evidence nor contention that such determination was erroneous. Apart from this, it is clear that on October 15, Rabe did not base his advice to Davis on the view that Respondent had already discharged its obligations under the settlement agreement, but expressed, rather, the belief that the situation created by the filing of the decertification petition might be equated with that where two unions are competing for bargaining rights. That belief, as we have seen, was directly contrary to the authority of *Perry Rubber*, *supra*, as well as *Poole Foundry*, *supra*, and the line of cases stemming from it; and, it is

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13. *Poole Foundry & Machine Co.*, 95 NLRB 34, 35-36, enf'd 192 F. 2d 740 (C.A. 4). *Accord*: *W. B. Johnston Grain Company*, 154 NLRB 1115, enf'd 365 F. 2d 582; *McDonald & Sons, Inc.*, 155 NLRB 67, enf'd 62 LRRM 2296 (C.A. 1); *Mid-City Foundry Co.*, 167 NLRB 795, 798-799. See, also, *Stant Lithograph, Inc.*, 131 NLRB 7, enf'd 297 F. 2d 782 (C.A. D.C.).

clear from the aforequoted language of *Poole Foundry* that, even if such belief was entertained in good faith, that would be no defense here.

It is, accordingly, found that, by bringing about the suspension of negotiations under the circumstances described above, Respondent violated Section 8(a)(5) and (1) of the Act.[14]

2. The 8(a)(3) issues

The delay in offering reinstatement

On February 25, 1971, while negotiations were still in progress, the Union wrote Respondent that it was making "an unconditional offer to return to work" and that on March 1, the strikers would report for work. In the morning of March 1, a number of strikers, hereinafter called "the claimants," did report to the plant, where they were met by Respondent's industrial relations director, Smith, and, pursuant to his instructions, they left with him their names and addresses. He indicated to them at that time that it would be necessary for Respondent to consult its counsel before any action could be taken on their applications. At 3 p.m. that day, no such action having as yet been taken, picketing was resumed, but only to protest the failure to reinstate the claimants, and, so far as the record shows, continued at least until June 24. No action was in fact taken on the foregoing applications until over a month later, and in some cases nearly 2 months later. The General Counsel contends, *inter alia*, that at the very least Respondent violated the Act by the foregoing

14. While the suspension of bargaining lasted little more than a month, even a 2-week suspension of bargaining because of the pendency of a decertification petition or other Board proceedings has been held unlawful. *The Perry Rubber Company, supra; Solo Cup Company*, 142 NLRB 1290.

delay in making any job offers to the claimants. Even assuming that the strike was still an economic one on March 1, it is well settled that the strikers were entitled to immediate reinstatement, upon their unconditional application, to their former or substantially equivalent positions if available, and that any delay in effecting reinstatement (beyond the 5-day period normally allowed by the Board) is *prima facie* a violation of Section 8(a)(3) and (1) of the Act.[15]

Respondent's works manager, Rothermel, testified that about January 1, 1971, business began to improve and openings developed in the press room, and that the reason for the delay of over a month in offering jobs to the strikers was the fact that Respondent's industrial relations director, Smith, was hospitalized early in March and Iaconetti, Respondent's general manager, was out of town on business. However, the unavailability of particular members of management for whatever reason is not sufficient ground for suspending an employer's duty to reinstate returning strikers, particularly where, as here, it appears that other management representatives were competent and available.[16]

Moreover, in the case of one employee, Millender, the record shows that, although she appeared at the plant on March 1 and left her name as instructed, she was never recalled to work; that, when she re-applied early in June, Rothermel explained that she had not been recalled be-

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15. *Community Motor Bus Company, Inc.*, 180 NLRB No. 105; *Coca-Cola Bottling Works, Inc.*, 186 NLRB No. 142, at pp. 4-6 (10-day delay unlawful).

16. In April, Rothermel did in fact handle the offers of reinstatement, in conjunction with Iaconetti, and no reason appears why he could not have done so sooner, with or without Iaconetti. The record shows, also, that Smith had an assistant, who handled the hiring of employees.

cause of an oversight; and that, although he then offered her a press room job, which she accepted, she has never been notified to report for work. Respondent offered no explanation for the failure to reinstate Millender after her application in June, and the reason given for not contacting her earlier was not sufficient in law. Thus, in the failure to reinstate Millender there was clearly a violation of Section 8(a)(3) and (1), whether she be deemed an economic or unfair labor practice striker.

Accordingly, even if it be assumed that the strike was still an economic one on March 1, 1971, Respondent violated Sections 8(a)(3) and (1) of the Act by waiting until various dates in April to offer reinstatement to the strikers and by failing to make any such offer at all to Millender.

The cancellation of seniority

During the month of April all the instant claimants (except Millender) were notified by letter to report for interviews concerning their reinstatement, they did so report and were interviewed by Rothermel and Iaconetti, and they were offered jobs, which in most cases they refused for various reasons. The General Counsel contends that the foregoing offers were invalid because of alleged differences between the jobs offered and those held by the claimants before the strike. Respondent disputes this. That issue will be dealt with hereinafter. At this point there will be considered only the question whether such offers were rendered invalid by attaching thereto discriminatory limitations on the claimants' accrued seniority rights.

Most of the claimants had worked for Respondent for at least 2 years before the strike and a substantial number for 4 or more years. Iaconetti, Respondent's general man-

ager, acknowledged that before the strike it was Respondent's policy not only to base vacation benefits on length of service, but also to give effect to seniority in the matter of layoffs, recalls and promotions where ability was equal.[17] He acknowledged, also, that Respondent required all new employees to serve a 60-day probationary period, and that until they satisfactorily completed that period they had no seniority, and were not covered by Respondent's group hospitalization plan.

When the claimants reported for job interviews during April, most or all of them were concededly required to sign a document entitled "Rogers Manufacturing Company Rules for New Employees", which set forth various plant rules and personnel policies, including the requirement that new employees serve a 60-day probationary period, and specified a new telephone number to be called by employees when unable to report for work. Works manager Rothermel acknowledged that this document was designed for distribution to new employees but denied that he considered the claimants to be in that category. He insisted that the reason for presenting it to them was to advise them of the new telephone number and that he told the claimants at their interviews that this was the "main reason" for showing them the document and that he disclaimed to them any intent to treat them as new employees. However, he admitted that, when any of the claimants inquired at the job interviews about their seniority, they were told that that matter was awaiting a ruling by the Board and that Respondent had no idea what the status of

17. While Rabe testified that before the strike seniority was used only in computing vacation benefits, the contrary testimony of Iaconetti, the operating head of the business, is entitled to more weight with regard to company personnel practices. In any event, even if it had in the past been used only for computing vacation benefits, seniority would still be a matter of some value to the employees.

their seniority was. He added that he, in fact, did not know what action would be taken by Respondent, if the question of honoring a former striker's seniority arose before any ruling was handed down by the Board, and that he told a few employees who asked him about it that he did not know what would happen to them in case of a layoff. While Rothermel denied that any of the claimants was expressly told that she had no seniority until the Board ruled on the matter, this was contradicted by Shaw, Webb, Dills, Bragg, Dawson, Ahlstrom, and Hamilton. The last named testified that Iaconetti told her that, if there was any layoff before the Board ruled on the matter, she would have to take the layoff. The others testified that they were told by Iaconetti or both Iaconetti and Rothermel that they would have to return as new employees until the Board ruled otherwise. Bragg testified that she was also told by Rothermel and Iaconetti that she would have to serve a 60-day probationary period and that she refused to return without seniority and as a probationary employee.[18] On the basis of demeanor and, since Iaconetti was silent on the point, the foregoing employee testimony is credited and it is found that they were told they would return as new employees until such time as the Board ruled otherwise; that the implications of such "provisional" loss of seniority were spelled out to Bragg and Hamilton, in the manner related by them; and that Bragg refused reinstatement because of the foregoing abrogation of her accrued seniority. Moreover, by telling other claimants that their seniority depended on the outcome of some proceeding before the Board, while requiring them to sign a document entitled "Rules for New Employees", Respondent engaged in conduct reasonably calculated to convey the impression

18. According to Rothermel, Bragg refused reinstatement because Respondent would give her no guarantee against layoff.

that such claimants would be treated as new employees, at least until some indefinite date in the future when the Board ruled on the matter, and that in the meantime they would have to bear the brunt of any layoffs. Finally, it is clear from those instances discussed above, where Respondent unequivocally stated that the strikers would be treated as new employees pending a Board ruling, that Respondent did in fact intend to cancel the strikers' entire accrued seniority, pending the outcome of this proceeding.

Respondent offered no unequivocal denial that such was in fact its intention. Rabe, the only witness to testify for Respondent on the point,[19] attempted only to explain the reason for the remarks made at the April interviews on the subject of the strikers' seniority. He testified that, as its counsel, he advised Respondent that, in discussing seniority with strikers, they be told only that the issue was before the Board and its decision would be dispositive of the matter. In explaining why he gave that advice, he related that a week or two before March 12, 1971, when the charge in Case No. 8-CA-6310 was filed, he had been told by the General Counsel that the Union would probably file a charge alleging a violation of the Act with respect to the issue of superseniority, and that he feared that the Union would seek to entrap Respondent into an unfair labor practice by attempting to elicit from it a statement of its position regarding the seniority rights of the returning strikers. However, no attempt was made to explain how disclosure to the claimants of an intent to reinstate their pre-strike seniority could have aided the Union to establish its charge of unlawful insistence on super-

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19. Rothermel professed to have no knowledge of the matter other than what he was instructed by Iaconetti to tell the claimants about their seniority. Iaconetti was not examined on the subject.

seniority, nor is it apparent how that could be the case.[20] When asked why Respondent could not have avoided entrapment by simply telling the claimants they would have the same seniority as before the strike, Rabe said:

> I had told the Union in all connections with the people returning that they would be entitled to whatever seniority rights that they had but we had to resolve this question with regard to the strike and what we were going to do about replacements and strikers. That this had to be resolved if we were going to settle the strike or have a contract.

If this means that Respondent fully intended to restore the claimants' pre-strike seniority, and had repeatedly assured the Union of this, one is at a loss to understand why Rabe was reluctant to give the same assurance to the claimants, themselves. It may be that in the foregoing passage Rabe meant to say that, before he could make any commitment in March 1971, about the claimants' pre-strike seniority, it was necessary to resolve the issue of their seniority rights *vis a vis* their replacements. However, by his own account, Respondent had long since abandoned superseniority as a bargaining demand and the only clause still on the bargaining table relating to the seniority of the returning strikers was the one described above, which only denied them any seniority credit for time spent on strike

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20. Is is not understandable, moreover, why if it feared entrapment into an appearance of violating the Act, Respondent would require the claimants to sign the "Rules for New Employees". Even if, as Rothermel claimed, the only purpose of such requirement was to apprise the claimants of a new telephone number for reporting absences, there were, as he conceded, other, less provocative means of giving them that information. One would think that a fear of entrapment would have dictated resort to such other means.

but did not purport to affect their pre-strike seniority.[21] Thus, there was nothing remaining to be resolved in the negotiations that could have affected the claimants' pre-strike seniority. In any case, fears of compromising a bargaining position or a position in Board litigation, even if better founded than they were here, would not seem to warrant leaving returning strikers in the dark about their seniority rights and would certainly not justify telling them that Respondent would not voluntarily grant them such rights.

It having been found that, in making offers of reinstatement to the claimants in April 1971, Respondent either impliedly or expressly conveyed to them its intention to cancel their seniority (unless and until compelled by the Board to restore it) and no adequate justification having been offered for such action, it is concluded that the foregoing cancellation of seniority invalidated such offers, thereby rendering them ineffective to toll backpay or otherwise discharge Respondent's reinstatement obligations under the Act, and that this is so whether or not the claimants be viewed as economic or unfair labor practice strikers.[22]

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21. Respondent's contract proposals of September 30, 1970, also contained a clause providing for cancellation of the accrued security of any employee who had not been in the "active" employ of Respondent for a specified period. While this clause on its face would seem applicable to the claimants, it was agreed at the hearing that such was not Respondent's intention.

22. *Ekco Products Company*, 117 NLRB 137, 149-150, where the Board held to be insufficient an offer, as here, to reinstate strikers as new employees, pending the result of a Board proceeding; *Philanz Oldsmobile, Inc.*, 137 NLRB 867. See, also, *N.L.R.B. v. Hilton Mobile Homes*, 387 F. 2d 7 (C.A. 8), where the court stated:

> We concur with the Board's decision than an offer of reinstatement which excludes seniority rights is not an offer of substantially equivalent employment. . . .

It is further found, absent any showing of economic justification therefor, that by the foregoing, disparate treatment of the strikers with respect to their seniority, Respondent violated Section 8(a)(3) and (1) of the Act.[23]

The nature of the jobs offered;
the conversion of the strike

The General Counsel contends, also, that the offers of reinstatement were inadequate because the strike had been converted by Respondent's unfair labor practices into an unfair labor practice strike and the claimants were therefore entitled to be reinstated, upon application, to their former or substantially equivalent jobs, except insofar as such jobs were filled at the time of such application by permanent replacements hired before the date of conversion of the strike. The General Counsel concedes that the strike began as an economic strike, but contends that it was converted into an unfair labor practice strike on August 19, 1969, when Respondent first proposed to grant superseniority to non-strikers and strike replacements. However, the General Counsel recognizes that under Section 10(b) of the Act the Board is barred from basing any finding of a violation of the Act on any event occurring more than 6 months before the service upon Respondent of the initial charge herein. Since such service was not effected until May 15, 1970, the applicable cut-off date is November 15, 1969.

The instant contention requires that a determination be made whether Respondent's pre-settlement conduct vio-

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23. *Community Motor Bus Company, Inc. supra; Erie Resistor Corp., supra; General Electric Co., supra; Duncan Foundry and Machine Works, Inc.*, 176 NLRB No. 31. As was pointed out in the case last cited, the necessary effect of the cancellation of the striker's seniority was to grant superseniority to the non-strikers and their replacements pending an adverse ruling by the Board.

lated the Act, and, if so, whether such conduct prolonged the strike. Such a determination may now appropriately be made, since, it having been found that various violations of the Act occurred after the settlement agreement, it no longer is a bar to a finding of pre-settlement violations.

It is apparent from what has already been said about the pre-settlement negotiations that the reaching of an accord on reinstatement of the strikers was repeatedly frustrated by disagreement over the issue of superseniority; that on August 19, 1969, and at nearly all subsequent pre-settlement meetings Respondent insisted on superseniority for non-strikers and strike replacements; and that an impasse on that issue was reached at least by the final, pre-settlement meeting on May 27, 1970.[24] Since superseniority was not a mandatory subject of bargaining,[25] it is found that at least by that date Respondent by such insistence violated Section 8(a)(5) and (1) of the Act.[26] It is also found that at least by that date such insistence alone prevented the reaching of an accord on reinstatement of the strikers, thereby prolonging the strike and converting it into an unfair labor practice strike.[27] There is, moreover,

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24. As already related, on June 19, 1970, the Union filed an amended charge, which added to the original charge an allegation of unlawful insistence on superseniority.

25. *Erie Resistor Corp., supra.*

26. *The Philip Carey Manufacturing Company*, 140 NLRB 1103, 1105, enf'd on this point 331 F. 2d 720 (C.A. 6), cert. denied 379 U.S. 888.

27. That is not to say that, if an accord had been reached on May 27, 1970, all the strikers would have been reinstated immediately. That would depend on whether Respondent on that date had sufficient suitable openings. The record sheds no light on this, other than Rabe's testimony indicating that many of the strike replacements did not prove satisfactory and had to be discharged and other testimony that Respondent experienced a high rate of turnover. It is clear therefore that the parties could have agreed at least on a program of gradual rehire of the strikers as vacancies developed, which was all the claimants were entitled to so long as they were economic strikers.

ample authority for finding a violation of the Act and conversion of the strike at an earlier date. In the *Erie Resistor* case, the Board found that such a violation and conversion occurred when the strikers reacted to the employer's superseniority proposal by voting to continue the strike, even though there was no finding by the Board of any impasse at that point.[28] In *Griffin Wheel Company*,[29] the Board found that the violation and conversion took place on the date when the respondent "embarked upon its unlawful course of conduct by announcing its superseniority policy." And, in the landmark case of *N.L.R.B. v. Borg-Warner*, 356 U.S. 342, the rule laid down by the Court was that insistence by a party on a non-mandatory bargaining demand violates the Act, if the party conditions agreement on acceptance of its demand. Here, the record is clear that at the November 14, 1969, bargaining meeting the Union was prepared to call off the strike and return the strikers to work without awaiting the outcome of the negotiations for a complete contract, and that the only obstacle to accord on that point was Respondent's position on superseniority. This was also true at the next meeting on December 3, 1969, as well as subsequent meetings. While Section 10(b) precludes a violation finding on the basis of the events of November 14, no such finding is barred with respect to the December 3 meeting. Under all the circumstances, the finding is therefore warranted that at that meeting Respondent insisted upon acceptance of its superseniority proposal as a condition of reaching accord on reinstatement of the strikers, and that but for such insistence the strike would have been terminated at that time. It is therefore found that December 3, 1969, was the earliest date, not barred by limitations, on which Respondent may be found

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28. 132 NLRB 631, 632.

29. 136 NLRB 1669, 1674.

to have violated the Act by its insistence on superseniority and on which the strike may be found to have been prolonged because of such insistence.[30]

It having been found that the strike was converted into an unfair labor practice strike on December 3, 1969, it follows that, when the claimants unconditionally applied for reinstatement on March 1, 1971, they were entitled to return to their former jobs to the extent that such jobs were not filled on that date by permanent replacements hired before December 3, 1969. The bulk of the claimants had worked before the strike in the co-called "assembly" area[31] as distinguished from the press room. In the press room Respondent's products were stamped out of metal bars through the operation of presses, some of which, ac-

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30. As it happens, no strike replacements were hired between December 3, 1969 and May 27, 1970, so that the selection of the earlier date rather than the later one as the date of conversion of the strike would not affect the reinstatement rights of the strikers. (See General Counsel's Exhibit 18, which shows that none of the strike replacements employed on March 1, 1971, in jobs formerly held by the strikers was hired between the two foregoing dates.)

The complaint alleges an additional, pre-settlement violation on the basis of Respondent's admitted suspension of negotiations on June 9, 1970, because of the filing by it of a petition for an election, which was dismissed by the Regional Director on August 3, 1970. Negotiations were not resumed until later that month, after the execution of the settlement agreement. Respondent's only defense is that such allegation is barred by Section 10(b) of the Act. However, that may be, no useful purpose would be served by dwelling on the issue, since a similar violation has been found to have occurred in the post-settlement period on the basis of Respondent's suspension of negotiations because of the filing of the decertification petition, and the remedial order to be recommended for that violation is sufficiently broad to encompass the one here under consideration. Accordingly, no finding will be made with respect thereto.

31. Although Respondent contended that none of the claimants was regularly assigned to the assembly department, since they were subject to transfer to the press department in emergencies, the record shows that, with few exceptions, such transfers were relatively infrequent and for only brief periods.

cording to general manager Iaconetti, were as large as the courtroom in which the instant hearing was held. The assembly area was devoted for the most part to various processing operations that did not involve the use of presses, and such presses as were used there were in general considerably smaller than those in the press room and admittedly less hazardous. Virtually all those interviewed in April 1971, were offered jobs as press operators in the press room. The record shows that on March 1, 1971, there were 13 employees in the assembly department who had been hired since December 3, 1969, and than none of their jobs was offered to any of the claimants at the April interviews.

It has already been found that the offers of reinstatement made in April were invalid because of the implied or express cancellation of the claimants' accrued seniority. In the ensuing discussion there will be considered additional, alleged deficiencies in such offers, as follows:

1. *Heflin.* She had worked before the strike in the press room on the second shift. In April, she was offered a job in the press room on the third shift, which she rejected because she would have no means of transportation at that time of night. She has since received no other offer. It is found that the foregoing offer was defective because, apart from anything else, it required her to work on a less desirable shift.[32]

2. *Wright.* She had worked only in the assembly area during the entire 4 years of her pre-strike employment. In April she was offered only a job in the press room, which she refused because she regarded the work there as more dangerous than in the assembly area, and

32. *Griffin Wheel Company*, 136 NLRB 1669, 1677.

the noise level was higher. It is found that the job in the press room was not the same as her pre-strike work.

3. *McClarin.* During the 4 years of her pre-strike employment she had worked only in the assembly area, except for about 3 days' work in the press room. In April, she was offered only work in the press room, which she refused. It is found that the work offered was not the same as her pre-strike job.

4. *Cooper.* She had worked before the strike only on a small, punch press or "hubber" in the assembly area. In April, she was offered only assignment to the press room, which concededly contained presses which were considerably larger than her old press and more dangerous to operate. She refused the offer because she did not feel qualified to operate the larger presses. It is found that she was not offered her pre-strike job.

5. *Webb.* She had worked in both the press and assembly area but her last. pre-strike assignment was in assembly. In April, she was offered only a press room job, which she ultimately refused because of the more hazardous conditions in the press room. It is found that she was not offered her pre-strike job.

6. *Shaw.* She had worked for Respondent for about 5 years before the strike, for the most part in the assembly area. On December 16, 1968, while at work there, she suffered an injury, which necessitated amputation of her hand. When the strike began she was on disability leave, and, while insisting at one point that she was never really "on the strike" she declared, elsewhere, that she did join the strike, explaining that she visited the picket line several times and during such a visit, apparently in June 1969, solicited a truckdriver not to cross the line. She added that about July 1, 1969, she was notified

by an insurance carrier that her hospitalization coverage as an employee of Respondent had been cancelled because she had been discharged by Respondent; that, when she telephoned Respondent about the matter, she was told that there was nothing for her at the plant; that she was, however, called in for a job interview in April 1971, and, when asked, if she could operate a press, said that she would "try"; that Respondent promised to call her within a few days; that she had no further word until 2 or 3 weeks later, when a management representative[33] encountered her outside the plant[34] and, when she told him of her need for work, invited her to come into the plant and discuss the matter; that she declined the invitation because she was not properly dressed to enter the plant; that she did not contact Respondent again because of baby-sitter problems and because she thought Respondent would put her back on her former job. It has already been found that at her April interview Shaw was required to sign the "Rules for New Employees" and told that she would have no seniority until the Board ruled on the matter, and she cited the foregoing abridgement of her seniority rights as an additional reason for not wishing to return to work. However, at one point in her testimony she stated that she had been unable to perform any work since her injury, which would, in itself, account for her failure to pursue the matter of her recall despite the invitation extended her at the picket line.

With regard to her April interview Rothermel testified that Shaw was told that due to her disability she was

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33. She identified him as Iaconetti. However, as related below, Rothermel testified that he was the one involved in this incident.

34. She had by that time joined the picket line, which had been re-established on March 1, 1971, as related above, to protest the delay in recalling the strikers.

not expected to operate a press and that as soon as some other openings developed she would be called. As for the picket line incident, Rothermel testified that on that occasion he told her that Respondent now had an opening for her and invited her to come into the plant and discuss it, but she declined to do so.

It appears from the foregoing, on the one hand, that there is reason to doubt that Shaw was a striker, she having vacillated in her own testimony as to whether she was in fact on strike. Whether on not she was withholding her services as a striker would depend, also, on whether she was physically able to perform such services. On the other hand, Respondent itself seems to have regarded her as a striker (rather than as an employee discharged for cause,[35] laid off for lack of work, or returning from disability leave) since, as found above, it indicated to her, as it did to all the other claimants, that her seniority status would depend on the outcome of litigation, which could have had reference only to the present proceeding and the issue of the seniority rights of the strikers. Matters were not helped by the confused and rambling character of much of Shaw's testimony, nor by the fact that none of the parties attempted to introduce any personnel records or medical data that might have clarified her status as an employee or striker at the time of her April interview. In view of the incompleteness of the record on the foregoing points, it is believed that her right to any relief may more appropriately be resolved in the compliance stage of this proceeding, and no final resolution thereof will be here attempted.

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35. The General Counsel contended at the hearing that she was discharged on July 1, 1969, for her picket line activity but conceded that her discharge could not now be found unlawful because of the limitations of Section 10(b).

7. *Dills.* She was rehired on April 21. The General Counsel seeks only backpay for her until that date. It will be so recommended.

8. *Whitacre.* On Saturday, April 17, she received a notice to report for work on the 22nd, a Wednesday. She testified that because of a conflict between the appointed time and her working hours on a part-time job she called the plant on the 19th and asked if she could report on the 21st or 23rd instead of the 22nd; that she was told that it would not be feasible for her to report on Tuesday because, if she accepted a job on that date, it would not be fair to the other girls who were scheduled to report at that time; and that her alternative offer to report on Thursday was rejected without any explanation. Rothermel testified that Whitacre asked only that her appointment be moved up to Monday; that he explained to her that that would conflict with the procedure adopted by Respondent of calling the girls in according to seniority; that he either requested or demanded[36] that she report on Wednesday; and that she appeared to acquiesce.

There was, thus, substantial agreement that Rothermel told Whitacre that it would prejudice the seniority rights of other claimants if she were allowed to report before Wednesday, but there is disagreement as to whether Whitacre offered to report on Thursday and whether she finally agreed to keep her Wednesday appointment. On the basis of demeanor, Whitacre is credited and it is found that she did offer to report on Thursday, that such offer was rejected by Rothermel, and that she did not thereafter agree to report on Wednesday. Rothermel's concern about following seniority in recall would not explain his refusal to permit Whitacre to waive her seniority and report *after* the scheduled date. On April 19, Respondent

36. He gave both versions.

had already delayed for over 7 weeks its response to her application for reinstatement and there was no evidence that there was such a pressing need for her services that Respondent could not have waited another day for her return.[37] Accordingly, it is found that the fact that Whitacre offered to report a day or two earlier or a day later than the date stipulated by Respondent did not relieve it of its obligation to her.[38]

Moreover, it is clear from the record that in April Respondent intended to offer the claimants only jobs in the press room. Thus, although it did not so specify, the notice to Whitacre was, in effect, an offer of a press room job. Since she had previously worked only in the assembly area, such offer was not a valid one.

9. *Hamilton.* She had worked for 4 years before the strike in the assembly area. In April, she was offered a press job but declined, pending clearance for that work by a physician, who was treating her at the time for a kidney condition. She testified that she could not obtain a medical clearance for the press job, but that her physician advised her she could perform her old duties in the assembly area. However, on May 31, she developed a condition that

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37. Such concern would not explain, moreover, why he could not have interviewed Whitacre on Tuesday (or Monday) and made her a provisional job offer, subject to her being reached on the basis of seniority.

38. This view is reinforced by the fact that in its recall notices to the claimants Respondent instructed them, if unable to report at the specified time, to call Rothermel and "tell him when you will be able to report." (See, e.g. General Counsel's Exhibit 13. Whitacre's testimony was to the same effect with regard to the notice sent her.) Even under Rothermel's version Whitacre had complied with this instruction by calling and telling him when she would be able to report. While the notice states that Respondent would treat a failure to report or to call Rothermel, if unable to report, as a rejection of the reinstatement offer, Whitacre was justified in believing that she had satisfied the "call-in" requirement of the notice.

concededly precluded her returning even to that work. The General Counsel accordingly seeks only backpay until that date. It will be so recommended.

10. *McMillan.* She had worked 4 years for Respondent, the last 2 years in the assembly area. In April she was offered a job in the press room but refused, because Respondent would give her no assurance concerning her seniority rights. She indicated at the same time that she would like to be called, if any job became available outside the press room. It is found that the job offered her was not the same as her former one.

11. *Wesley.* She had worked for 3 years in the assembly area. On one or two occasions during that period she had been temporarily assigned to the press room. In April she was offered a press room job. After objecting that it was not the same as the one she had left, she finally agreed to take it. However, after working in the press room for one day, she quit because of the noise, physical strain, and fear of injury. It is found that the press room job was not the same as her former one.

12. *Chatmon.* She had worked for 4 years in the assembly area, except for assignments for 2 days a month to the press room. In April she was offered a job working only in the press room. She refused because of the hazardous nature of the press room work. It is found that the job offered her was not the same as her former one.

13. *Ahlstrom.* She had been in Respondent's employ for about 8 months before the strike. When hired, she was initially assigned to the press room but developed a nervous condition, which she attributed to the tension connected with that work. She was then assigned to the assembly area, where she worked for 6 months until the strike began. In April she was offered only a press room

job, which she declined because of her previous, unfortunate experience in the press room. She expressed the view at the hearing that the hazardous nature of work in the press room was responsible for her former nervous condition. It is found that she was not offered the same job as she held before the strike.

14. *Maschmeier.* The General Counsel seeks only backpay for her from March 6, 1971, to the date in April that she returned to work. It will be so recommended.

15. *Dawson.* She had worked for 2 years in the assembly area, except for 3 or 4 days in the press room. In April, she was offered only a press room job, which she accepted. However, after 3 weeks she quit, testifying that she did so because she became ill and nervous from the physical and mental strain of operating the presses. It is found that she was not reinstated to her pre-strike job.

16. *Millender.* Although she applied on March 1, 1971, she was never recalled, apparently due to an oversight. She is entitled to reinstatement to her former job in the assembly area, or, if it is no longer in existence, to a substantially equivalent job, and to backpay from March 6, 1971, until a proper offer of reinstatement is made.

17. *Hixon.* The General Counsel seeks only backpay for her from March 6, 1971, to the date in April that she returned to work. It will be so recommended.

18. *Kyle.* The General Counsel seeks only backpay for her from March 6 to April 21, 1971, when she was offered reinstatement but declined for reasons not here relevant.

19. *Bragg.* She had worked in the press room before the strike for about 2 years and 9 months. In April, she was offered reinstatement in the press room but, as has

already been found, was told that she would have to return as a new employee on a 60-day, probationary basis and she refused the job on that account. Accordingly, for reasons already stated, it is found that the offer of reinstatement to her was invalid because of the cancellation of her accrued seniority.

20. *Wodley.* She had worked for over 4 years in the assembly area alone. In April she was offered only a press room job, which she declined because of her fear of the presses. It is found that she was not offered her pre-strike job.

21. *Stott.* She had worked for 4½ years in the assembly area, except for a 6-week stint in the press room, which ended when she developed an infection from the oil in the presses. In April she was offered only a press room job, which she declined because of her fear of reinfection and because of the danger of injury from the presses. It is found that she was not offered her pre-strike job.

22. *Sheppard.* The General Counsel seeks only backpay for her from March 6 to April 22, when she accepted a job in the press room. It will be so recommended.

23. *O'Neal.* Although she had worked in the assembly area for 2½ years, she was offered only a press room job, which she declined, requesting that she be returned to her pre-strike job. Respondent refused to do so. O'Neal attributed her rejection of the Respondent's offer to her fear of the hazards of the press room. It is found that she was not offered her pre-strike job.

24. *Knotts.* He was the only male claimant. He had worked primarily on maintenance. He applied for reinstatement on March 1, 1971 and was notified to report for work on March 31, but declined because he did not wish to cross the picket line. The General Counsel seeks only

backpay for him from March 6 to 31. It will be so recommended.

25. *Williams.* The General Counsel seeks only backpay for her from March 6 to April 19, 1971, when she returned to work in the press room. It will be so recommended.

26. *Elliott.* The General Counsel seeks only backpay for her from March 6 to April 17, 1971, when she accepted a press room job. It will be so recommended.

It has been found that 14 of the foregoing 26 claimants were regularly employed in the assembly area before the strike and that 11 of them declined offers of press room jobs, which were not the same as their pre-strike jobs.[39] It has also been found that on March 1, 1971, there were 13 jobs in the assembly area that were filled by employees hired after May 27, 1970, when the strike was converted into an unfair labor practice strike. It is now further found, as the General Counsel contends, that such jobs in the assembly area were either the same as, or substantially equivalent to, those held by the foregoing 11 claimants and that they were therefore entitled to be reinstated to those jobs by March 6, 1971.[40]

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39. Of the remaining three, Dawson accepted a press room job but quit after a brief trial, Millender received no offer at all, and the offer to Whitacre was inadequate for reasons explained above.

40. There is accordingly no need to consider what the situation would be, if no such assembly area jobs had been in existence at that time. However, it may be noted that there was no substantial dispute that the jobs in the press room were more hazardous than those in the assembly area, including those which involved operation of the relatively small presses there located. There was also no contradiction of employee testimony that the noise level was higher in the press room and that the work required greater physical effort. In view of this, there can be little doubt that the press room jobs were not substantially equivalent to those in the assembly area. (As to the significance of the safety factor in this regard, see *Elmira Machine and Specialty Works, Inc.*, 148 NLRB 1695, 1696, where the facts were strikingly similar to those in the case at bar.)

As for Dawson, she is also entitled to an offer of reinstatement in the assembly area, as are Millender and Whitacre. Heflin is entitled to be offered her old shift and Bragg is entitled, like all the others, to an offer of her former, or, if it is no longer in existence, a substantially equivalent job, with assurance that she will receive full credit for her past service for seniority purposes.

Reinstatement offers after April 1971

Iaconetti testified that after the April interviews enough jobs became available in the assembly area to take care of all the claimants, and that such jobs were offered to various claimants as they became available. However, he vacillated greatly as to the number of claimants who received such offers and, although he claimed to have documentary proof thereof, none was produced. Moreover, Rothermel admitted that jobs in the assembly area were not offered to any of the claimants after April 1971, as such jobs became available. On this state of the record, Rothermel is deemed the more credible witness, and it is found that, although, as Iaconetti acknowledged, sufficient jobs in the assembly area became available after April 1971, to permit the proper reinstatement of all the claimants, such jobs were not offered to them as they became available.[41]

However, it does appear that Respondent did make a blanket reinstatement offer to the Union under the circumstances next related. On June 30, 1971, Respondent received a new request from the Union for reinstatement of the claimants to their former or substantially equivalent positions, and on the same day Respondent offered by letter to the Union to comply with that request, concluding:

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41. Under *Laidlaw Corp.*, 171 NLRB No. 175, Respondent had a continuing obligation to the claimants in this respect, whether they be deemed economic or unfair labor practice strikers.

> Each striker is herein notified to return to work on July 6, 1971 . . . on the shift that the striker was working at the time he or she went out on strike.

This letter was delivered on July 1, to the Union's office in Cleveland.[42] None of the claimants reported for work on July 6. According to Respondent's counsel, Kaminski, at a bargaining session on July 13, the Union protested that there had not been sufficient time to meet the deadline in Respondent's letter and asked for an extension of that deadline. Kaminski added that he countered with a proposal that the Union give Respondent a list of the current job applicants together with the jobs and shifts they desired and Respondent "would study it and make the appropriate offer"; that on August 5, he indicated he would be satisfied with a list containing only the names of such applicants; that later in the month he received from the Union a document purporting to be such a list; and that he pointed out that this list contained names of some who had already returned to work and questioned whether it was an accurate compilation of those currently desiring reinstatement. That was apparently the end of the matter.

The initial question to be determined here was whether Respondent's reinstatement offer of June 30, was adequate. In view of the fact that any reply addressed to Cleveland would have had to be relayed to the Union's representative in Akron, who would have had to contact the various claimants still desiring re-employment, and that all this had to be done during a period of 4 days that contained a 3-day holiday weekend, it is found that the offer was inadequate.[43]

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42. The Union's letter requested that Respondent's reply be mailed to that office.

43. *Rybolt Heater Co.*, 173 NLRB No. 89; *Collins Mining Co.*, 177 NLRB 221.

It is clear, moreover, that the Union's alleged failure to furnish Respondent with an accurate list of strikers currently desiring reinstatement did not relieve Respondent of its obligations to the claimants. It could not require the Union to assume part of the burden of effecting the reinstatement of the strikers.[44] Particularly apposite here is the following language of the Board majority in the *Coca-Cola* case, *supra*:

> . . . the Respondent's reinstatement obligations accrued on November 4, when the Union made a blanket request for the reinstatement of all striking employees. Union Representative Menaker's failure at that time to be able to predict with any degree of certainty whether or not a particular striker would accept reemployment in no way limited the nature of the Union's request or the Respondent's obligation to respond to it in timely fashion. Nor can the Respondent relieve itself of this responsibility by countering the Union's request with a demand that the Union assume obligations which properly rest with the Respondent.

Here, all that Respondent needed to do to discharge its reinstatement obligation was to renew the blanket offer it had made to the Union on June 30, specifying a new, reasonable reporting date. There was no need for Respondent to address such offer to the individual claimants, nor does Respondent so contend; and, Kaminski's position was only that he requested the Union to supply an accurate list of those still desiring employment to facilitate the orderly handling of the reinstatement process. However, this was the same contention as was made by the respondent in the *Coca-Cola* case, *supra*, and rejected by the Board majority. When it was pointed out to Kaminski that he had admittedly been prepared on July 6, to rein-

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44. *Coca-Cola Bottling Works, Inc.*, 186 NLRB No. 142, at pp. 5-6.

state the claimants without the aid of any such list, he indicated that subsequent events had caused him to doubt the Union's good faith in requesting reinstatement of the claimants. However, the proper way to resolve that doubt was to make a legally sufficient offer to comply with the Union's request, and not to make no offer at all.

IV. The Remedy

It having been found that Respondent violated Section 8(a)(1), (5) and (3) of the Act, it will be recommended that it be required to cease and desist therefrom and take appropriate, affirmative action. Such action shall include a proper offer to reinstatement to Heflin, Wright, McClarin, Cooper, Webb, Whitacre, McMillan, Wesley, Chatmon, Ahlstrom, Dawson, Millender, Bragg, Wodley, Stott, and O'Neal, together with compensation for any loss of earnings suffered between March 6, 1971, and the date of such offer as a result of Respondent's failure to reinstate them. In addition, it will be recommended that Respondent be required to compensate the following employees for any loss of earnings suffered as a result of its failure to reinstate each of them between March 6 and the date specified after each name:

1. Dills —April 21
2. Hamilton —May 31
3. Maschmeier—date of return to work in April
4. Hixon —date of return to work in April
5. Kyle —April 21
6. Sheppard —April 22
7. Knotts —March 31
8. Williams —April 19
9. Elliott —April 17[45]

45. As already indicated no recommendation will be made as to Shaw, final disposition of her claim being reserved for compliance proceedings.

Backpay shall be computed in accordance with the formula stated in *F. W. Woolworth Company*, 90 NLRB 289; interest shall be added to backpay at the rate of 6 percent per annum. (*Isis Plumbing & Heating Co.*, 138 NLRB 716.)

In view of the nature of the violations found herein, particularly the discriminatory refusals of reinstatement, a threat of future violations exists, which warrants a broad cease and desist provision.

V. Conclusions of Law

1. The Rogers Manufacturing Company is an employer within the meaning of Section 2(2) of the Act, and is engaged in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By insisting, since December 3, 1969, on superseniority for non-strikers and strike replacements as a condition of reaching agreement on reinstatement of strikers and by suspending bargaining in October and November 1970, because of the filing of a decertification petition, Respondent has violated Section 8(a)(5) and (1) of the Act.

4. By requiring strikers to return to work as new employees, by withholding for over a month any action on the claimants' application of March 1, 1971, for reinstatement, by failing to make any offer of reinstatement to Millender and Whitacre and by failing to make a proper offer of reinstatement to the other claimants, Respondent has violated Section 8(a)(3) and (1) of the Act.

5. The strike herein was converted into an unfair labor practice strike on December 3, 1969.

6. The above unfair labor practices affect commerce within the meaning of the Act.

Upon the above findings of fact, conclusions of law, and the entire record in the case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[46]

ORDER

Respondent, The Rogers Manufacturing Company, Akron, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1610, UAW, or any other labor organization, and discouraging employee concerted activities for mutual aid and protection, by refusing or failing to reinstate strikers, upon application, or by otherwise discriminating against them in regard to their hire or tenure of employment or any other term or condition of employment, including their accrued seniority rights.

(b) Insisting upon superseniority for non-strikers and strike replacements as a condition of reaching agreement on the reinstatement of strikers.

(c) Suspending bargaining merely because of the filing of a decertification petition or because of the pendency of any other Board proceeding.

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46. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

(d) In any other manner, interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join, or assist the above-named Union, or any other labor organization to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities, except to the extent permitted by the proviso in Section 8(a)(3) of the Act.

2. Take the following affirmative action, which is deemed necessary to effectuate the policies of the Act:

(a) Continue to bargain, upon request, with the above-named Union as the exclusive representative of the employees in the unit described below, with respect to wages, hours, and other terms and conditions of employment, and, if an agreement is reached, embody it in a signed contract.

> All production and maintenance employees at Respondent's No. Arlington Street plant, in Akron, Ohio, including all engraving and stamping division employees and progressive pulley division employees, but excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

(b) Offer to reinstate all those named in "Appendix A" attached hereto in their former positions or, if such positions no longer exist, in substantially equivalent positions, without prejudice to their seniority or other rights and privileges, discharging, if necessary, any persons hired since December 3, 1969.

(c) In the manner and to the extent prescribed in the "Remedy" section of the Trial Examiner's Decision,

make whole the employees named in "Appendix A" and the others named in that section for any loss of earnings suffered as a result of Respondent's failure to make them proper offers of reinstatement, upon their application.

(d) Immediately notify any of those entitled to an offer of employment under paragraph (b) above, who are personally serving in the Armed Forces of the United States, of their right to such employment, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(f) Restore to all employees who engaged in the strike of June 9, 1969, all seniority accrued since their date of original hire, including the period of the strike, in accordance with the policies and practices of Respondent existing before the strike and give each such employee individual notice of such restoration of seniority.

(g) Post at its plant at Akron, Ohio, copies of the notice attached hereto, marked "Appendix B."[47] Copies of said notice, on forms to be provided by the Regional Director for Region 8, shall, after being duly signed by Respondent's representative, be posted by it immediately

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47. In the event that the Board's Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

upon receipt thereof, and maintained by it for a period of at least 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that such notices are not altered, defaced or covered by any other material.

(h) Notify the Regional Director for Region 8, in writing, within 20 days from the date of receipt of this Order, what steps Respondent has taken to comply herewith.[48]

IT IS ORDERED that the settlement agreement of August 5, 1970, be, and it hereby is, set aside.

IT IS FURTHER ORDERED that all allegations of the complaint which have been found lacking in merit be dismissed.

Dated at Washington, D. C. Feb. 9, 1972.

/s/ SIDNEY SHERMAN
Trial Examiner

APPENDIX A

Carol Heflin	Barbara Whitacre
Dorothy Wright	Juanita McMillan
Ethel McClarin	Mickey Wesley
Genevieve Cooper	Mary Chatmon
Wanda Webb	Betty Ahlstrom
Anna Dawson	Carole Millender
Gladys Bragg	Mary Wodley
Dorothy Stott	Rosemary O'Neal

48. In the event that this recommended Order is adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for Region 8, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith."

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL
LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Act gives all employees these rights:

To engage in self-organization

To form, join, or help unions

To bargain collectively through a representative of their own choosing

To act together for collective bargaining or other aid or protection; and

To refrain from any or all of these things.

WE WILL NOT do anything that interferes with these rights.

WE WILL continue to bargain, upon request, with INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 1610, UAW, as the exclusive representative of the employees in the unit described below with respect to wages, hours and all other terms and conditions of employment, and, if an agreement is reached, embody it in a signed contract. The unit is:

All production and maintenance employees at our No. Arlington Street plant, in Akron, Ohio, including all engraving and stamping division employees and progressive pulley division employees, but excluding all office clerical employees, and all professional employees, guards and supervisors as defined in the Act.

WE WILL NOT insist upon a clause granting superseniority to non-strikers and strike replacements as a condition of reaching agreement.

WE WILL NOT withdraw recognition from the above-named Union merely because of the filing of a decertification petition.

WE WILL offer to hire the persons named below in their old jobs, and, if such jobs no longer exist, in substantially equivalent jobs, displacing, if necessary, any persons hired since December 3, 1969:

Carol Heflin	Barbara Whitacre
Dorothy Wright	Juanita McMillan
Ethel McClarin	Mickey Wesley
Genevieve Cooper	Mary Chatmon
Wanda Webb	Betty Ahlstrom
Anna Dawson	Carole Millender
Gladys Bragg	Mary Wodley
Dorothy Stott	Rosemary O'Neal

WE WILL compensate the above-named employees for any earnings lost by them as a result of our failure to make them proper offers of reinstatement. We will also compensate the following employees for any loss of earnings resulting from our delay in reinstating them:

Helen Dills	Haley Sheppard
Sylvia Hamilton	Clarence Knotts
April Maschmeier	Eulah T. Williams
Ernestine Hixon	Norma Elliott
Annette Kyle	

The Rogers Manufacturing Company
(Employer)

Dated ..... By .....
(Representative) (Title)

This Is An Official Notice and Must Not Be Defaced By Anyone

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1695 Federal Office Bldg., 1240 E. 9th Street, Cleveland, Ohio 44199 (Tel. No. 216—522-3715).

BEFORE THE NATIONAL LABOR RELATIONS BOARD
(Title omitted in printing)

MOTION OF GENERAL COUNSEL TO CORRECT TRANSCRIPT OF TESTIMONY

(Dated December 3, 1971)

Now comes Marc J. Bloch, Counsel for the General Counsel, and moves that the following corrections in the official transcript in the above captioned case be amended and substitute pages prepared to reflect the following corrections:

1. Page 7, line 24: "contract law" to be changed to "violations"
2. Page 11, line 3: "1971" to be changed to "1970"
3. Page 13, line 7: "1971" to be changed to "1970"
4. Page 22, line 21: "Minutes of the meeting" to be changed to "Minutes of the Board action"

5. Page 26, line 6: "1970" to be changed to "1971"
6. Page 53, line 22: "September 2" to be changed to "December 2"
7. Page 54, line 10: "September 2" to be changed to "December 2"
8. Page 72, line 22: "February 1, 1971" to be changed to "February 13, 1970"
9. Page 76, line 10: "Legal Director" to be changed to "Regional Director"
10. Page 82, line 6: "D" to be changed to "I.D."
11. Page 90, line 15: "September 3" to be changed to "December 3"
12. Page 90, line 24: "September 3" to be changed to "December 3"
13. Page 92, line 3: "September 29" to be changed to "December 29"
14. Page 108, line 2: "D" to be changed to "I.D."
15. Page 108, line 19: "D" to be changed to "I.D."
16. Page 111, line 22: "search" to be changed to "researched"
17. Page 117, line 23: "she" to be changed to "he"
18. Page 122, line 16: "none" to be changed to "some"
19. Page 191, line 23: "Ruth Greising" to be changed to "Dick Rothermel"
20. Page 192, line 1: "She" to be changed to "he"
21. Page 192, line 4: "her" to be changed to "him"

22. Page 212, line 7: "destructive discharge" to be changed to "constructive discharge"

23. Page 215, line 22: "destructive discharge" to be changed to "constructive discharge"

24. Page 215, line 23: "destructive discharge" to be changed to "constructive discharge"

25. Page 216, line 19: "destructive discharge" to be changed to "constructive discharge"

Dated at Cleveland, Ohio, this third day of December 1971.

Respectfully submitted,

/s/ MARC J. BLOCH
Counsel for the General Counsel
National Labor Relations Board
Region 8

BEFORE THE NATIONAL LABOR RELATIONS BOARD
(Title omitted in printing)

ORDER OF TRIAL EXAMINER

(Dated January 17, 1972)

A. The General Counsel's Motion of December 3, 1971, to correct the transcript is granted with the following modifications:

(1) The erroneous date at page 72, line 22 of the transcript is "February the 1st, 1971" not "February 1, 1971." (See General Counsel's proposed correction No. 8.)

(2) The correction at page 191, line 23 of the transcript should be "Iaconetti" not "Dick Rothermel". (See General Counsel's proposed correction No. 19.)

B. The transcript will be deemed to be corrected further as follows, unless good cause to the contrary is shown on or before January 24, 1972.

No.	Page	Line	Error	Correction
1	6	7		The transcript should show at this point that General Counsel's Exhibits 2 and 3 were received in evidence.
2	8	19	1971	1970
3	9	5	1971	1970
4	10	23	agreement	committee
5	12	24	they settled	you settled
6	12	25	conceive they	concede you
7	21	8	certification	decertification
8	21	14	certification	decertification
9	22	2–3	on the certification	because of the decertification petition
10	26	16	we would	he would
11	29	13	for the	before the
12	29	16	about the	before the
13	29	17	against his wishes	whether he wishes
14	31	8	of November, 1969,	from November 1969, to
15	45	23	issue	ruling

16	51	4	unit	union
17	53	6	discussion	decision
18	60	11	intention	contention
19	63	16-17	of the cover letter of September 13th	under the cover letter of September 30th
20	63	18	proceed for	provide that
21	63	19		strike "and"
22	73	8	all strikers	all but a few strikers
23	73	15	would be	would not be
24	73	20	September	December
25	76	14	seniority	superseniority
26	82	9	are waiving	were waiving
27	82	9	demand	demands
28	82	23		Insert "information" before "on"
29	84	14	September	December
30	86	21-22	presented to the company the proposal	presented to them the company proposal
31	89	20	violation	injunction
32	90	22	agreed with	disagreed with
33	92	2		Insert "without superseniority" after "accept"
34	92	3	September	December
35	93	11	five	fifty
36	99	8	23rd	3rd
37	111	1 & 4	10th	19th
38	114	22	of	apart from
39	116	6	1969	1970
40	121	15	18th	19th
41	121	21 & 22	testify	stipulate
42	126	23	take	would take

43	127	25	1970	1971
44	123	2	1970	1971
45	132	23	when the union discussed	that the union discuss
46	138	6	1971	1970
47	138	11-13		Strike this paragraph after "company", and substitute the following: "had made a proposal in December and that in the meeting of February 13, 1970, Mr. Sheppard offered to accept the proposal and the company said, 'Our position has changed because of the bombing.'"
48	138	18	complete your	impeach her
49	142	3	10(a) and (b)	10(b) and (c)
50	150	7	don't	only
51	158	3	were able	were there
52	158	12	8(3)(5)	8(a)(5)
53	163	15	just	all but
54	167	24	one	none
55	175	22	has	is
56	182	20	16th	1st
57	194	21	were going to give my	weren't going to give me my
58	197	15	you said	he said
59	222	9	Did you run	Did he say whether you could run
60	225	18		Insert "without" after "be"
61	229	10	leave your	refuse a
62	229	25	sent a letter	shown a paper

63	244	9	previously	actively
64	244	13	one day	91 days
65	257	15	you said	they said
66	259	20	wouldn't	would
67	267	20	open to	entitled to
68	284	11	I was	It was
69	297	6	press line	paint line
70	298	9	testimony	name
71	301	13	unit	union
72	327	2	or	for
73	334	16-17	on your job	your old job
74	337	3	inspection	infection
75	342	20-21	the call	were called
76	345	1	define	decline the
77	345	14	didn't want to go back	wasn't called back
78	348	10		Insert "and not" before "because"
79	348	15	proof	truth
80	348	22	I have a right to disqualify myself	You have the right to disqualify me
81	349	1	throw out	shore up
82	349	8	of	for the
83	349	9	maybe	make
84	349	16	Smith	Street
85	366	2	taking her	claiming backpay for her
86	371	21	at the time	up to the time
87	375	2	he didn't	we didn't
88	375	3	give a	give us a
89	389	14	364	374
90	390	1	are the	are not the

91	391	1		Insert "for" after "percent"
92	400	3	press	practice
93	401	1	has changed	is changed
94	401	17	the jobs	the other jobs
95	402	20	dyes	dies
96	402	21	dye	die
97	410	25	assembly?	press room?
98	411	6	they were	we were
99	424	16	on-press	non-press
100	436	3	4th	24th
101	441	12	would be	would not be
102	441	18	he said	you said
103	441	20	You are	They are
104	443	10 & 15	strike	strict
105	449	19	offer	arbitrate
106	450	4		Insert "it was not clear" after "saying that"
107	450	5		Strike "as it was clear"
108	450	10	argued	already
109	450	23½	strike	strict
110	454	1	He said	I said
111	459	21½	I think	I don't think
112	Illegible	1	had the right	may have been right
113	Illegible	12	take	make
114	465	15	(d)4	(b) (4)
115	465	15	mentioned	moved
116	466	2	has made no obligation	was a labor organization
117	468	9		the Rosie I am talking about started
118	471	8	first month	fifth month

119	473	18	on the strike went on	went out on strike
120	478	12	men	women
121	478	10	I understand	you understand
122	480	12	chart	charge
123	480	16	can see	concede
124	481	12	in case we	and in cases where
125	485	4	He offered	We offered
126	488	4	there are no supervisors	there is no supervisory issue
127	395	15-16		Strike "has any contention. The"
128	502	22-23		Strike this sentence and substitute the following: "Would you say most of them were hired after '69?"
129	505	9	we signed	she signed
130	511	7		Insert "new" before "employees"
131	511	25	asked them to call you	ask you to call them
132	517	12-14		Change this sentence to read: "Did the company make a proposal to the union that non-strikers have super-seniority over strikers?"
133	517	18		Change this line to read: "seniority status of the non-strikers relative to the"
134	518	18	and if we	and we
135	519	10	if we hired	if you hired
136	519	11	had laid off	had to lay off
137	519	19	Then you indicated	Did you indicate

138	520	9	told him	told them
139	520	9	the man	the new man
140	520	16-17		Change this sentence to read: "Why should a replacement have more consideration than a returning striker?"
141	520	17	They would	He would
142	520	22		Change this line to read: "Why should the replacement have more seniority?"
143	521	8	they were	it was
144	526	10	to which	at which
145	527	2		Insert "or" after "negotiation"
146	527	13	Do you	Did you
147	528	6		Insert "replacements over" before "the strikers"
148	528	16	read in	revised
149	531	13	add	and
150	534	6	discussion incidents	provisions discussed
151	535	9	work	word
152	535	10½	If there is	Unless there is
153	540	23	You were	We were
154	548	14½	company ever	union ever
155	550	12	You were violating	You were charged with violating
156	550	14-15	could propose	had proposed
157	551	19		Insert "seniority" after "applied"
158	552	10	seniority	settled

159	551	18	but I said	but he said
160	555	22½	he could	she could
161	562	3	delay of	matter of
162	562	3	day	year
163	565	16	evekacy	efficacy
164	566	6	digest	digests of
165	566	11	taking	giving
166	567	4	has been	has not been
167	567	20	bloomed	loomed
168	569	15½	Bargain units	Bargaining unit employees
169	576	22	170	1970
170	577	22½	strikers	non-strikers
171	583	15	the offer	the author
172				Change the designation of Mr. Rabe's letter of October 26, 1970, in the Exhibit File from "Resp. Exhibit No. 17" to "General Counsel's Exhibit No. 17."

C. Respondent's Exhibit 17, attached to its brief to the Trial Examiner, is hereby rejected and will be placed in the exhibit file as a rejected exhibit.

/s/ SIDNEY SHERMAN
Trial Examiner

Dated January 17, 1972
Washington, D. C.

BEFORE THE NATIONAL LABOR
RELATIONS BOARD

(Title omitted in printing)

MOTION TO LEAVE TRANSCRIPT UNCHANGED

(Dated January 21, 1972)

Pursuant to the motion of the General Counsel, the Trial Examiner has ordered 174 changes in the transcript. No one knows or has any recollection of all the changes requested. The purpose of a transcript is to provide as near as possible a verbatim record of the trial and, obviously, neither counsel nor the Trial Examiner should make wholesale changes in the transcript. It is inconceivable that this number of changes should be made. It is conceivable that some or all of the parties may have recollection of some few specific facts that may be incorrect, however, not to the extent contained in the Trial Examiner's Order.

Many of the changes obviously are not based on recollection, but rather they are based upon General Counsel's idea of what makes a better grammatical presentation. On the other hand, many of the changes are changes of substance, for example—

> Item No. 25, page 76, line 14. The transcript uses the word "seniority" and the change is to "superseniority". This witness used both words interchangeably and it is impossible for anybody to say that he was saying supersenority instead of seniority. The transcript should not be changed to change the substance of this sentence.

Item No. 33, page 92, line 2. The General Counsel would insert an entirely new phrase "without super-seniority". This changes the entire concept of the sentence. It makes sense as written by the Court Reporter, however, as rewritten by the General Counsel it says something entirely different and something more favorable to the General Counsel's case.

Item 78, page 348, line 10. Again the General Counsel would add a phrase that does not appear in the transcript. Without the phrase the sentence means one thing and with the phrase it has an entirely different meaning.

Items 140 and 142, referring to page 520, lines 16-17 and 22. Again the General Counsel has completely rewritten questions. The sentence makes sense without the rewriting, and again the rewriting changes the entire meaning of the sentence.

Before changes of such a voluminous nature and of such substance should be made, a study should be made of the stenographer's notes to determine whether or not a different construction, than that appearing in the transcript, can be made. Anyone wishing to make such changes of substance should be required to supply an affidavit rather than relying upon what counsel regards as being the better way to say something.

In summary, the changes are so vast as to render the transcript itself meaningless and with regard to substance if there is any real question a more serious inquiry ought to be made into the alleged mistakes in the transcript. Counsel for the Respondent is willing to be bound by the transcript as it is written and so should the Board, inas-

much as this is the Board's proceeding and the Board provides the Court Reporter.

/s/ EDWARD C. KAMINSKI
Attorney for Rogers Manufacturing Company
BUCKINGHAM, DOOLITTLE & BURROUGHS AND HERNDON & BARTLO

BEFORE THE NATIONAL LABOR RELATIONS BOARD
(Title omitted in printing)

ORDER OF TRIAL EXAMINER

(Dated January 26, 1972)

In response to the order of January 17, 1972, to show cause why certain corrections of the transcript should not be made, Respondent on January 24, filed a motion opposing all such corrections on the ground that it was not practicable to make the large number of corrections proposed in that order because of the alleged inability of counsel and the Examiner to recall what was said at the hearing. However, while it does not often happen that a transcript contains as many questioned items as this one, the situation is not an unusual one, and this Examiner knows of no comparable situation where the mere number of such items was deemed a sufficient reason to dispense with any corrections.

Respondent contends, also, that most of the proposed changes were not based on recollections but on the General Counsel's notion of what would be a "better grammatical presentation." However, all the foregoing changes

were proposed not by the General Counsel[1] but by this Examiner, and are based not only on his recollection of his own remarks, as well as those of the witnesses and counsel, but also on extensive notes taken by him at the hearing, and the context in which the questioned items appear.[2] Respondent proposes further that reference should be made to the reporter's notes as a basis for any corrections. When the show cause order was issued counsel were urged to review them carefully and, if necessary, consult their witnesses. This was not intended to preclude reference to the reporter's notes. However, as Respondent may feel that it has not had adequate time to consult with the reporter, it will be granted additional time for that purpose. It is, accordingly, ordered that the time for replying to the order of January 17, is hereby extended to February 4, 1972.[3]

/s/ SIDNEY SHERMAN
Trial Examiner

Dated: January 26, 1972
Washington, D. C.

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1. He had filed a motion on December 3, 1971, proposing a relatively small number of corrections. As it was not opposed by Respondent, that motion was granted with certain modifications in the January 17 order.

2. This was particularly true of the numerous changes involving obvious mistakes in dates.

3. Respondent suggests also that the proponent of any changes be required to support them with an affidavit. However, the better procedure from an administrative standpoint would be to permit the opponent of a change to submit an affidavit that the transcript accurately reflects the affidavit's recollection. Any such affidavit, submitted by February 4, 1972, will be considered, together with all other relevant circumstances, including any counter-affidavit, in resolving the matter.

BEFORE THE NATIONAL LABOR RELATIONS BOARD
(Title omitted in printing)

RESPONSE TO ORDER OF TRIAL EXAMINER DATED JANUARY 26, 1972

(Dated February 3, 1972)

Respondent stands on its response to the Trial Examiner's Order of January 17, 1972. Respondent further maintains that such massive correction of the transcript, prepared by a Court Reporter retained on contract by the agency, constitutes a denial of due process to Respondent.

s/ EDWARD C. KAMINSKI
Attorney for Rogers Manufacturing Company
BUCKINGHAM, DOOLITTLE & BURROUGHS AND HERNDON & BARTLO

February 3, 1972

BEFORE THE NATIONAL LABOR RELATIONS BOARD

(Title omitted in printing)

ORDER OF TRIAL EXAMINER

(Dated February 7, 1972)

A. On January 26, 1972, the General Counsel filed certain objections to the order of January 17, 1972, which objections are disposed of as follows:

1. The objection to the correction in paragraph A(1) of that order is overruled. The objection is based on a

misconstruction of that provision of the order as rejecting the General Counsel's motion of December 3, 1971, to correct the date appearing at page 72, line 22 of the transcript to read "February 13, 1971". The effect of paragraph A(1) of the order was, in fact, to grant that motion. The only modification of the motion that was intended was with respect to reference therein to the erroneous date in the transcript as "February 1, 1971", rather than "February the 1st, 1971", which was the date actually appearing in the transcript.

2. The objection to item No. 13 in paragraph B of the order is rejected.

3. The objection to item No. 52 in paragraph B is granted and the record is corrected to read "8(a)(3)" at the point indicated.

4. The other objections are overruled.

B. In response to the order of January 26, 1972, extending time for filing objections to the order of January 17, 1972, Respondent on February 3, 1972, filed a statement reiterating its previous objections to the corrections of the transcript proposed in the January 17 order and contending that "such massive correction of the transcript, prepared by a Court Reporter retained on contract by the agency, constitutes a denial of due process." That seems tantamount to saying that a party is entitled as a matter of due process to have his case decided on the original transcript, however defective or unintelligible. I am aware of no authority for this, nor for holding as Respondent implies, that the Board is estopped from correcting the errors of the reporter, because retained by it. Accordingly, no good reason to the contrary appearing, it is ordered that, except as noted in paragraph A, above,

the corrections proposed in the order of January 17, 1972, be, and they hereby are, adopted.

/s/ SIDNEY SHERMAN
Trial Examiner

Dated: February 7, 1972
Washington, D. C.

THE UNITED STATES CONSTITUTION
AMENDMENT V

No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in a militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

RELEVANT STATUTES
5 U.S.C. § 706

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

28 U.S.C. § 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

* * *

29 U.S.C. § 156

The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this sub-chapter.

29 U.S.C. § 160

(e) Petition to court for enforcement of order; proceedings; review of judgment.

* * *

Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States Court of Appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

RULE 10(E) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

(e) *Correction or Modification of the Record*

If any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made conform to the truth. If anything material to either party is omitted from the record by error or accident or is misstated therein, the parties by stipulation, or the district court, either before or after the record is transmitted to the court of appeals, or the court of appeals, on proper suggestion or of its own initiative, may direct that the omission or misstatement be corrected, and if necessary that a supplemental record be certified and transmitted. All other questions as to the form and content of the record shall be presented to the court of appeals.

No. 73-1074

FEB 19 1974

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

THE ROGERS MANUFACTURING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

PETER G. NASH,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

In the Supreme Court of the United States

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1. The Board found that petitioner ("the Company") violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by insisting on superseniority for replacement employees as a condition of granting reinstatement to strikers, and by refusing to meet and bargain with its employees' certified bargaining representa-

tive[1] (Pet. App. A57). The Board further found that the Company violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by delaying and withholding offers of reinstatement to strikers, by offering striking employees reinstatement only on condition that they return as new employees, and by offering reinstatement to jobs not substantially equivalent to those held by the employees prior to the strike (*ibid.*). The Board ordered the Company to cease and desist from the unfair labor practices found, to offer reinstatement to the strikers and make them whole for any loss of earnings resulting from the Company's discrimination, and to bargain with the Union upon request (Pet. App. A58-A61). The court of appeals enforced the Board's order (Pet. App. A1-A10).

2. Petitioner does not contest the Board's findings that it violated Section 8(a)(1), (3), and (5) of the Act. Petitioner's sole contention is that the action of the Trial Examiner in making 172 changes in the transcript of testimony (Pet. App. A67-A74) denied it due process of law. This issue does not warrant review by this Court.

As the court below noted, and petitioner recognizes (Pet. 7), a trial judge has "sua sponte power to correct the record in accordance with his memory" (Pet. App. A10). The court below correctly concluded that

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[1] International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 1610, UAW ("the Union").

the Trial Examiner did not abuse that power here. As the examiner pointed out, the corrections were "based not only on [the examiner's] recollection of his own remarks, as well as those of the witnesses and counsel, but also on extensive notes taken by him at the hearing, and the context in which the questioned items appear" (Pet. App. A78). Moreover, before making the changes, the examiner afforded petitioner an opportunity to consult its witnesses and the reporter's notes and to show why such changes should not be made (Pet. App. A67, A78).

Most of the changes in the transcript consisted of corrections of typographical errors (Pet. App. A64-A74). Petitioner's principal complaint relates to the addition of the words "superseniority" to the testimony of union representative Peter Costello. The court of appeals correctly concluded that petitioner had not suffered any prejudice from the correction:

> We are satisfied from a review of the record that the modification of the testimony is corroborated by testimony by the same witness to the same effect in two other places in the transcript, neither of which are challenged by the Company. * * * [Pet. App. A10.][2]

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[2] Union representative Peter Costello testified as follows:

Q. Referring you to December 3, 1969, did you attend a negotiating meeting at that time?
A. Yes, I did.
Q. Would you tell us what happened at that meeting?
A. We discussed again about the strikers coming back to work and it was said the strikers would be returned and the nonstrikers would have super-seniority

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

FEBRUARY 1974.

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and this we discussed and disagreed with. [Court of Appeals App. 42.]

Costello affirmed this testimony under questioning by the Trial Examiner (Court of Appeals App. 47).

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